United Nations

Report of the International Law Commission

Sixty-third session
(26 April–3 June and 4 July–12 August 2011)

General Assembly
Official Records
Sixty-sixth session
Supplement No. 10 (A/66/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission.*

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2011.*

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Chapter I
Introduction

1. The International Law Commission held the first part of its sixty-third session from 26 April to 3 June 2011 and the second part from 4 July to 12 August 2011 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Nugroho Wisnumurti, Chairman of the sixty-second session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Mohammed Bello Adoke (Nigeria)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Lucius Caflisch (Switzerland)
Mr. Enrique J. A. Candioti (Argentina)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Christopher John Robert Dugard (South Africa)
Ms. Concepción Escobar Hernández (Spain)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Hussein A. Hassouna (Egypt)
Mr. Mahmoud D. Hmoud (Jordan)
Mr. Huikang Huang (People's Republic of China)
Ms. Marie G. Jacobsson (Sweden)
Mr. Maurice Kamto (Cameroon)
Mr. Fathi Kemicha (Tunisia)
Mr. Roman Anatolyevitch Kolodkin (Russian Federation)
Mr. Donald M. McRae (Canada)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Shinya Murase (Japan)
Mr. Bernd H. Niehaus (Costa Rica)
Mr. Georg Nolte (Germany)
Mr. Alain Pellet (France)
Mr. A. Rohan Perera (Sri Lanka)
Mr. Ernest Petrič (Slovenia)
Mr. Gilberto Vergne Saboia (Brazil)
Mr. Narinder Singh (India)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Stephen C. Vasciannie (Jamaica)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Mr. Michael Wood (United Kingdom of Great Britain and Northern Ireland)

B. Casual vacancy

3. On 28 April 2011, the Commission elected Ms. Concepción Escobar Hernández (Spain) to fill the casual vacancy occasioned by the death of Ms. Paula Escarameia. On 17 May 2011, the Commission elected Mr. Mohammed Bello Adoke (Nigeria) to fill the casual vacancy occasioned by the resignation of Mr. Bayo Ojo.

C. Officers and the Enlarged Bureau

4. At its 3080th meeting on 26 April 2011, the Commission elected the following officers:

Chairman:	Mr. Maurice Kamto (Cameroon)
First Vice-Chairman:	Ms. Marie G. Jacobsson (Sweden)
Second Vice-Chairman:	Mr. Bernd H. Niehaus (Costa Rica)
Chairman of the Drafting Committee:	Mr. Teodor Viorel Melescanu (Romania)
Rapporteur:	Mr. A. Rohan Perera (Sri Lanka)

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

6. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Ms. M.G. Jacobsson (Chairperson), Mr. L. Caflisch, Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. C.J.R. Dugard, Ms. C. Escobar Hernández, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. F. Kemicha, Mr. R.A. Kolodkin, Mr. T.V. Melescanu, Mr. D.M. McRae, Mr. S. Murase, Mr. B. Niehaus, Mr. G. Nolte, Mr. A. Pellet, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. A.R. Perera (*ex officio*).

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[1] Mr. E. Candioti, Mr. Z. Galicki, Mr. M. Kamto, Mr. T.V. Melescanu, Mr. A. Pellet, Mr. E. Petrič, Mr. E. Vargas Carreño and Mr. N. Wisnumurti.

[2] Mr. L. Caflisch, Mr. G. Gaja, Mr. Z. Galicki, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. A. Pellet and Mr. E. Valencia-Ospina.

D. Drafting Committee

7. At its 3080th meeting on 26 April 2011, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Effects of armed conflicts on treaties*: Mr. T.V. Melescanu (Chairman), Mr. L. Caflisch (Special Rapporteur), Mr. E. Candioti, Mr. S. Fomba, Mr. Z. Galicki, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. S. Murase, Mr. E. Petrič, Mr. G.V. Saboia, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

(b) *Drafting Committee on responsibility of international organizations*: Mr. T.V. Melescanu (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. E. Candioti, Mr. S. Fomba, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. D.M. McRae, Mr. S. Murase, Mr. E. Petrič, Mr. G.V. Saboia, Mr. E. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. A.R. Perera (*ex officio*).

(c) *Expulsion of aliens*: Mr. T.V. Melescanu (Chairman), Mr. M. Kamto (Special Rapporteur), Mr. P. Comissário Afonso, Ms. C. Escobar Hernández, Mr. S. Fomba, Mr. Z. Galicki, Mr. M.D. Hmoud, Mr. D.M. McRae, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

(d) *Protection of persons in the event of disasters*: Mr. T.V. Melescanu (Chairman), Mr. E. Valencia-Ospina (Special Rapporteur), Mr. E. Candioti, Mr. C.J.R. Dugard, Ms. C. Escobar Hernández, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. D.M. McRae, Mr. S. Murase, Mr. G. Nolte, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

8. The Drafting Committee held a total of 27 meetings on the four topics indicated above.

E. Working Groups and Study Groups

9. At its 3080th meeting on 26 April 2011, the Commission reconstituted the following Working Groups and Study Groups:

(a) *Working Group on Reservations to treaties*: Mr. M. Vázquez-Bermúdez (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. E. Candioti, Ms. C. Escobar Hernández, Mr. S. Fomba, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. H. Huang, Mr. M. Kamto, Mr. D.M. McRae, Mr. G. Nolte, Mr. E. Petrič, Mr. N. Singh, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

(b) *Study Group on Treaties over time*: Mr. G. Nolte (Chairman), Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. C.J.R. Dugard, Ms. C. Escobar Hernández, Mr. G. Gaja, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. B.H. Niehaus, Mr. E. Petrič, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

(c) *Study Group on The Most-Favoured-Nation clause*: Mr. D.M. McRae and Mr. A.R. Perera (Co-Chairs), Mr. L. Caflisch, Mr. E. Candioti, Ms. C. Escobar Hernández, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. S. Murase, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. G.V. Saboia, Mr. N. Singh, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti and Mr. M. Wood.

10. The Planning Group established or reconstituted the following Working Groups:

(a) *Working Group on Methods of work*: Mr. H.A. Hassouna (Chairman), Mr. L. Caflisch, Mr. E. Candioti, Mr. S. Fomba, Mr. Z. Galicki, Ms. M.G. Jacobsson, Mr. T.V. Melescanu, Mr. S. Murase, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

(b) *Working group on the Long-term Programme of Work for the quinquennium*: Mr. E. Candioti (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Ms. C. Escobar Hernández, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood and Mr. A.R. Perera (*ex officio*).

F. Secretariat

11. Ms. Patricia O'Brien, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director, served as Deputy Secretary. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Mr. Gionata Buzzini and Ms. Hanna Dreifeldt-Lainé, Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

12. At its 3080th meeting, on 26 April 2011, the Commission adopted an agenda for its sixty-third session consisting of the following items:

1. Organization of the work of the session.
2. Reservations to treaties.
3. Responsibility of international organizations.
4. Effects of armed conflicts on treaties.
5. Expulsion of aliens.
6. The obligation to extradite or prosecute (*aut dedere aut judicare*).
7. Protection of persons in the event of disasters.
8. Immunity of State officials from foreign criminal jurisdiction.
9. Treaties over time.
10. The Most-Favoured-Nation clause.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the sixty-fourth session.
13. Cooperation with other bodies.
14. Filling of casual vacancies in the Commission.
15. Other business.

Chapter II
Summary of the work of the Commission at its sixty-third session

13. As regards the topic **"Reservations to treaties"**, the Commission had before it the seventeenth report (A/CN.4/647) of the Special Rapporteur, addressing the question of the reservations dialogue, as well as addendum 1 to the seventeenth report (A/CN.4/647/Add.1), which considered the issue of assistance in the resolution of disputes concerning reservations, and also contained a draft introduction to the Guide to Practice. Furthermore, the Commission had before it the comments and observations received from Governments on the provisional version of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-second session (2010) (A/CN.4/639 and Add.1).

14. The Commission established a Working Group in order to proceed with the finalization of the text of the guidelines constituting the Guide to Practice, as had been envisaged at the sixty-second session (2010). The Commission also referred to the Working Group a draft recommendation or conclusions on the reservations dialogue, contained in the seventeenth report of the Special Rapporteur, and a draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained in addendum 1 to the seventeenth report.

15. On the basis of the recommendations of the Working Group, the Commission adopted the Guide to Practice on Reservations to Treaties which comprises an introduction, the text of the guidelines with commentaries thereto, as well as an annex on the reservations dialogue. In accordance with article 23 of its Statute, the Commission recommended to the General Assembly to take note of the Guide to Practice on Reservations to Treaties and to ensure its widest possible dissemination.

16. The Commission also adopted a recommendation to the General Assembly on mechanisms of assistance in relation to reservations (chap. IV).

17. Concerning the topic **"Responsibility of international organizations"**, the Commission adopted, on second reading, a set of 67 draft articles, together with commentaries thereto, on the responsibility of international organizations, and in accordance with article 23 of its Statute recommended to the General Assembly to take note of the draft articles in a resolution and to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

18. In the consideration of the topic at the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/640) surveying the comments made by States and international organizations on the draft articles on responsibility of international organizations adopted on first reading at the sixty-first session (2009) and making recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments (A/CN.4/636 and Add.1) and international organizations (A/CN.4/637 and Add.1) on the draft articles adopted on first reading (chap. V).

19. As regards the topic **"Effects of armed conflicts on treaties"**, the Commission adopted, on second reading, a set of 18 draft articles and an annex (containing an indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), together with commentaries thereto, on the effects of armed conflicts on treaties, and in accordance with article 23 of its Statute recommended to the General Assembly to take note of the draft articles in a resolution and

to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

20. At the present session, the Drafting Committee continued and concluded its consideration (commenced at its sixty-second session (2010)) of the second reading of the draft articles on the effects of armed conflicts on treaties (chap. VI).

21. In relation to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission considered the second (A/CN.4/631) and third (A/CN.4/646) reports of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure (chap. VII).

22. Concerning the topic "**Expulsion of aliens**", the Commission had before it addendum 2 to the sixth report (A/CN.4/625/Add.2) as well as the seventh report (A/CN.4/642) of the Special Rapporteur. The Commission also had before it comments and information received thus far from Governments (A/CN.4/604 and A/CN.4/628 and Add.1).

23. Addendum 2 to the sixth report completed the consideration of the expulsion proceedings (including the implementation of the expulsion decision, appeals against the expulsion decision, the determination of the State of destination and the protection of human rights in the transit State) and also considered the legal consequences of expulsion (notably the protection of the property rights and similar interests of aliens subject to expulsion, the question of the existence of a right of return in the case of unlawful expulsion, and the responsibility of the expelling State as a result of an unlawful expulsion, including the question of diplomatic protection). Following a debate in plenary, the Commission referred seven draft articles on these issues to the Drafting Committee, as well as a draft article on "Expulsion in connection with extradition" as revised by the Special Rapporteur during the sixty-second session (2010).

24. The seventh report provided an account of recent developments in relation to the topic and also proposed a restructured summary of the draft articles. The Commission referred the restructured summary of the draft articles to the Drafting Committee (chap. VIII).

25. In relation to the topic "**Protection of persons in the event of disasters**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1), dealing with the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. Following a debate in plenary, the Commission decided to refer draft articles 10 to 12, as proposed by the Special Rapporteur, to the Drafting Committee.

26. The Commission provisionally adopted six draft articles, together with commentaries, including draft articles 6 to 9, which it had taken note of at its sixty-second session (2010), dealing with humanitarian principles in disaster response, human dignity, human rights and the role of the affected State, respectively, as well as draft articles 10 and 11, dealing with the duty of the affected State to seek assistance and with the question of the consent of the affected State to external assistance (chap. IX).

27. Concerning the topic "**The obligation to extradite or prosecute (*aut dedere aut judicare*)**", the Commission considered the fourth (A/CN.4/648) report of the Special Rapporteur addressing the question of sources of the obligation to extradite or prosecute,

focusing on treaties and custom, and concerning which three draft articles were proposed (chap. X).

28. In relation to the topic "**Treaties over time**", the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice. The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of *ad hoc* jurisdiction, by examining the section of the report which addressed the question of possible modifications of a treaty by subsequent agreements and practice as well as the relation of subsequent agreements and practice to formal amendment procedures.

29. The Study Group then began its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and practice, by focusing on certain conclusions contained therein. In the light of the discussions, the Chairman of the Study Group reformulated the text of nine preliminary conclusions relating to a number of issues such as reliance by adjudicatory bodies on the general rule of treaty interpretation, different approaches to treaty interpretation, and various aspects concerning subsequent agreements and practice as a means of treaty interpretation (chap. XI).

30. Regarding the topic "**The Most-favoured-nation clause**", the Commission reconstituted the Study Group on the Most-Favoured-Nation clause. The Study Group held a wide-ranging discussion, on the basis of the working paper on the Interpretation and Application of MFN Clauses in Investment Agreements and a framework of questions prepared to provide an overview of issues that may need to be considered in the context of the overall work of the Study Group, while also taking into account other developments, including recent arbitral decisions. The Study Group also set out a programme of work for the future (chap. XII).

31. The specific issues on which comments by Governments would be of particular interest to the Commission in relation to topics that remain under its consideration are found in chapter III.

32. The Commission established a Planning Group to consider its programme, procedures and working methods (chap. XIII, sect. A). As a result of the work undertaken throughout the quinquennium by the Working Group on the Long-Term Programme of Work, the Commission decided to include in its long-term programme of work the following topics: "Formation and evidence of customary international law", "Protection of the atmosphere", "Provisional application of treaties", "The fair and equitable treatment standard in international investment law", and "Protection of the environment in relation to armed conflicts" (chap. XIII, sect. A.1). The Commission reconsidered its methods of work and adopted recommendations on, *inter alia*, Special Rapporteurs, Study Groups, the Drafting Committee, preparation of commentaries to draft articles, how to make the Commission's report more informative and the relations between the Commission and the Sixth Committee (chap. XIII, sect. A.2).

33. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe, and the Inter-American Juridical Committee. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (chap. XIII, sect. D).

34. A training seminar was held with 26 participants of different nationalities (chap. XIII, sect. H).

35. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 7 May to 1 June and 2 July to 3 August 2012 (chap. XIII, sect. B).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

A. Immunity of State officials from foreign criminal jurisdiction

36. What approach would States wish the Commission to take on this topic? Should the Commission seek to set out existing rules of international law (*lex lata*), or should the Commission embark on an exercise of progressive development (*lex ferenda*)?

37. Which holders of high office in the States (Heads of State, Heads of Government, Ministers for Foreign Affairs, others) enjoy *de lege lata*, or should enjoy *de lege ferenda*, immunity *ratione personae*?

38. What crimes are, or should be, excluded from immunity *ratione personae* or immunity *ratione materiae*?

39. It would greatly assist the Commission if States could provide information on their law and practice in the field covered by the Special Rapporteur's three reports (A/CN.4/601, A/CN.4/631 and A/CN.4/646). Such information could include recent developments in the case law and legislation. Information on the procedural issues covered by the Special Rapporteur's third report (A/CN.4/646) would be particularly helpful.

B. Expulsion of aliens

40. With regard to the topic "Expulsion of aliens", the Commission would like to know from States whether, in their national practice, suspensive effect is given to appeals against an expulsion decision:

- relating to an alien lawfully in the territory;
- relating to an alien unlawfully in the territory;
- relating to either, irrespective of category.

41. Does a State that has such a practice consider it to be required by international law?

42. The Commission would also welcome the views of States on whether, as a matter of international law or otherwise, an appeal against an expulsion decision *should* have suspensive effect on the implementation of the decision.

C. Protection of persons in the event of disasters

43. The Commission reiterates that it would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome, in particular, information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters.

44. The Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?

D. The obligation to extradite or prosecute (*aut dedere aut judicare*)

45. Are there, in the legislation of States or in the case law of domestic tribunals, certain crimes or categories of crimes in respect of which the obligation to extradite or prosecute has been implemented?

46. If so, has a court or tribunal ever relied, in this respect, on customary international law?

E. Treaties over time

47. The Commission, in its consideration of the topic "Treaties over time", attempts to clarify the practical and legal significance of "subsequent agreements" and the "subsequent practice" of the parties as a means of interpretation and application of treaties (article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties). In this context, the Commission reminds States of its request, contained in its 2010 report,[3] to provide it with one or more examples of "subsequent agreements" or "subsequent practice" which are or have been relevant to the interpretation and application of one or more of their treaties. The Commission would be interested, in particular, in instances of interpretation by way of subsequent agreements or subsequent practice which have not been subject to judicial or quasi-judicial proceedings.

F. The Most-Favoured-Nation clause

48. In order to complete its work on the Most-Favoured-Nation clause in relation to the field of investment law, the Study Group on The Most-Favoured-Nation clause plans to consider whether any use of Most-Favoured-Nation clauses in areas outside those of trade and investment law could provide it with guidance for its work. Accordingly, the Commission would appreciate being provided with examples of any recent practice or case law in relation to Most-Favoured-Nation clauses in fields other than trade and investment law.

G. New topics

49. The Commission decided to include in its long-term programme of work five new topics referred to in paragraphs 365 to 367 of the current report. In the selection of these topics, the Commission was guided by the following criteria that it had agreed upon in 1998,[4] namely that the topic (a) should reflect the needs of States in respect of the progressive development and codification of international law, (b) should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification and (c) is concrete and feasible for progressive development and codification, and (d) that account should also be taken of those topics that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on these new topics.

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[3] Report of the Commission on the work of its sixty-second session (2010), *Official records of the General Assembly, Sixty-fifth Session* (Supplement No. 10), A/65/10, Chapter III, paras. 26–28.

[4] Report of the Commission on the work of its fiftieth session (1998) (A/53/10), *Yearbook ...*, 1998, vol. II (Part Two), p. 110, para. 553.

50. In addition, the Commission would welcome any proposals that States may wish to make concerning possible topics for inclusion in its long-term programme of work. It would be helpful if such proposals were accompanied by a statement of reasons in their support, taking into account the criteria, referred to above, for the selection of topics.

Chapter IV
Reservations to treaties

A. Introduction

51. The Commission, at its forty-fifth session (1993), decided to include the topic "The law and practice relating to reservations to treaties"[5] in its programme of work and, at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.[6]

52. At the forty-seventh session (1995), following the Commission's consideration of his first report,[7] the Special Rapporteur summarized the conclusions he had drawn from the Commission's debate, including a change of the title of the topic to "Reservations to treaties"; the form the results of the study should take, namely, a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties.[8] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. The Guide to Practice would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; the guidelines would, if necessary, be accompanied by model clauses. At the same session (1995), the Commission, in accordance with its earlier practice,[9] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[10]

53. At its forty-eighth (1996) and forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur's second report,[11] to which was annexed a draft resolution on reservations to normative multilateral treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[12] At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties,

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[5] The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

[6] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[7] A/CN.4/470 and Corr.1 and 2.

[8] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[9] See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

[10] As of 31 July 2011, 33 States and 26 international organizations had responded to the questionnaire. See also the comments and observations mentioned in paragraph 56 below.

[11] A/CN.4/477 and Add.1.

[12] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

including human rights treaties.[13] In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

54. From its fiftieth session (1998) to its sixty-first session (2009), the Commission considered 14 more reports[14] and a note[15] by the Special Rapporteur, along with a memorandum by the Secretariat on reservations to treaties in the context of succession of States,[16] and provisionally adopted 199 draft guidelines and the commentaries thereto.[17]

55. At its sixty-second session (2010), the Commission, having completed the provisional adoption of the Guide to Practice on Reservations to Treaties, indicated that it intended to adopt the final version of the Guide to Practice during its sixty-third session (2011), and that, in doing so, it would take into consideration the observations of States and international organizations as well as the organs with which the Commission cooperates, made since the beginning of the examination of the topic, together with further observations received by the Secretariat of the Commission before 31 January 2011.[18]

B. Consideration of the topic at the present session

56. At the present session, the Commission had before it the seventeenth report of the Special Rapporteur (A/CN.4/647 and Add.1), which it considered at its 3099th, 3104th and 3106th meetings, on 6, 13 and 15 July 2011, as well as the comments and observations received from Governments on the Guide to Practice as provisionally adopted by the Commission at its sixty-second session (A/CN.4/639 and Add.1).

57. At its 3080th meeting, on 26 April 2011, the Commission decided to establish a working group on reservations to treaties, chaired by Mr. Marcelo Vázquez-Bermúdez, to work on finalizing the Guide to Practice as envisaged by the Commission at its sixty-second session (2010).[19] The Working Group reviewed the version of the Guide to Practice provisionally adopted in 2010 on the basis of the changes proposed by the Special Rapporteur in the light of the oral and written observations made by States on the topic since 1995.

58. At its 3090th meeting, on 20 May 2011, the Commission took note of the first report of the Chairman of the Working Group on Reservations to Treaties, in which he presented

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[13] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

[14] Third report (A/CN.4/491 and Corr.1, Add.1, Add.2 and Corr.1, Add.3, Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); fourth report (A/CN.4/499); fifth report (A/CN.4/508, Add.1–4); sixth report (A/CN.4/518 and Add.1–3); seventh report (A/CN.4/526 and Add.1–3); eighth report (A/CN.4/535 and Add.1); ninth report (A/CN.4/544); tenth report (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2); eleventh report (A/CN.4/574); twelfth report (A/CN.4/584); thirteenth report (A/CN.4/600); fourteenth report (A/CN.4/614 and Add.1 and 2); fifteenth report (A/CN.4/624 and Add.1 and 2); and sixteenth report (A/CN.4/626 and Add.1).

[15] A/CN.4/586.

[16] A/CN.4/616.

[17] For a detailed historical overview, see *Official Documents of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257–269.

[18] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 45.

[19] See para. 55 above.

to the Commission the text of the guidelines constituting the Guide to Practice on Reservations to Treaties (A/CN.4/L.779), as finalized by the Working Group.

59. At its 3099th meeting, on 6 July 2011, the Commission entrusted the Working Group on Reservations to Treaties with the task of finalizing the text of a draft recommendation or conclusions of the Commission on the reservations dialogue, contained in the Special Rapporteur's seventeenth report (A/CN.4/647, para. 68). At its 3106th meeting, on 15 July 2011, the Commission also referred to the Working Group a draft recommendation of the Commission on technical assistance and assistance in the settlement of disputes concerning reservations, as proposed by the Special Rapporteur in the addendum to his seventeenth report (A/CN.4/647/Add.1).

60. At its 3114th meeting, on 28 July 2011, the Commission took note of the second report of the Chairman of the Working Group on Reservations to Treaties and of the recommendations of the Working Group with respect to (1) conclusions and a recommendation on the reservations dialogue, intended to appear in an annex to the Guide to Practice on Reservations to Treaties (A/CN.4/L.793), and (2) a draft recommendation of the Commission to the General Assembly on mechanisms of assistance in relation to reservations (A/CN.4/L.795).

61. At its 3118th and 3120th to 3125th meetings, from 5 to 11 August 2011, the Commission adopted the guidelines and commentaries constituting the Guide to Practice on Reservations to Treaties, including an introduction to the Guide to Practice and an annex setting out conclusions and a recommendation of the Commission on the reservations dialogue.

62. The text of the guidelines constituting the Guide to Practice on Reservations to Treaties followed by an annex on the reservations dialogue is reproduced in section F.1 below; the text of the Guide to Practice including an introduction, commentaries, the annex on the reservations dialogue and a bibliography is reproduced in the continuation of section F.2, contained in an addendum to this report (A/66/10/Add.1).

63. In accordance with its Statute, the Commission submits to the General Assembly the Guide to Practice on Reservations to Treaties, together with the recommendation set forth in section C below.

64. The Commission also submits to the General Assembly the recommendation on mechanisms of assistance in relation to reservations, set forth in section D below.

1. Consideration of the seventeenth report of the Special Rapporteur

(a) Introduction by the Special Rapporteur

65. The seventeenth report (A/CN.4/647) dealt with the question of the reservations dialogue, while the addendum to it (A/CN.4/647/Add.1) addressed the question of assistance in the settlement of disputes concerning reservations and proposed a draft introduction on how to use the Guide to Practice.

66. The Special Rapporteur recalled that the phrase "reservations dialogue" was not a term of art with a precise meaning but an expression he himself had coined in the addendum to his eighth report (A/CN.4/535/Add.1). The expression "reservations dialogue" alluded to the fact that, independently of the substantive and procedure rules applicable to reservations, contracting States and contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope and meaning of the reservations or objections to reservations formulated by a contracting State or a contracting organization. Such a dialogue, which could take place before as well as

after a reservation was formulated, could take many forms and employ a wide variety of methods. While the normal interplay of objections and acceptances often served to start a reservations dialogue, the practice revealed the existence of *sui generis* reactions to reservations, reactions that constituted neither acceptances nor objections but that could nonetheless be taken into account by the author of the reservation — who might, in some cases, be induced to withdraw its reservation or limit its scope — or by dispute settlement bodies or treaty monitoring bodies. A particular form of reservations dialogue took place under the auspices of treaty monitoring bodies, especially those charged with monitoring the implementation of human rights treaties. The Special Rapporteur stressed that the reservations dialogue offered advantage, notably, that it sought to prevent positions from becoming fixed, to allow the author of the reservation to explain its reasons and to facilitate better understanding among the parties concerned. The Special Rapporteur therefore thought that the Commission should not only take that practice into account but should encourage it, while taking care not to destroy its spontaneity and effectiveness through a legal formalism that might make it inflexible. That was the purpose of the draft recommendation or conclusions on the reservations dialogue proposed in the seventeenth report,[20] which was intended to encourage States and international organizations to engage

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[20] The draft recommendation or conclusions, contained in paragraph 68 of the seventeenth report (A/CN.4/647), read as follows:

Draft recommendation or conclusions of the International Law Commission on the reservations dialogue

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Bearing in mind the need to safeguard the integrity of multilateral treaties while ensuring the universality of those for which universal accession is envisaged,

Recognizing the usefulness of reservations to treaties formulated within the limits imposed by the law of treaties, including article 19 of the Vienna Conventions and concerned at the large number of reservations that appear incompatible with these requirements,

Aware of the difficulties that States and international organizations face in assessing the validity of reservations,

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation and of cooperation among all reservations stakeholders,

Welcoming the efforts made in recent years, including within the framework of human rights treaty bodies and certain regional organizations,

1. *Calls upon* States and international organizations wishing to formulate reservations to ensure that they are not incompatible with the object and purpose of the treaty to which they relate, to consider limiting their scope, to formulate them as clearly and concisely as possible, and to review them periodically with a view to withdrawing them if appropriate;

2. *Recommends* that in formulating a reservation, States and international organizations should indicate, to the extent possible, the nature and scope of the reservation, why the reservation is deemed necessary, the *effects* of the reservation on fulfilment by the author of the reservation of its treaty obligations arising from the instrument *in* question, and whether it plans to limit the reservation's effects, modify it or withdraw it according to a specific schedule and modalities;

3. *Recommends also* that States and international organizations should state the reason for any modification or withdrawal of a reservation;

4. *Recalls* that States, international organizations and monitoring bodies may express their concerns about a reservation and stresses the usefulness of such reactions for assessment of the validity of a reservation by all the key players;

in such a dialogue whenever possible in the manner they deemed appropriate. The Special Rapporteur thought it preferable to address the question of the reservations dialogue, not in the body of the Guide to Practice, but in an annex to the Guide that could take the form of recommendations or conclusions.

67. The Special Rapporteur noted that the reservations dialogue was not always successful and sometimes ended without resolving differences of opinion that could have practical consequences. Nonetheless, it was not appropriate for the Commission to propose a full-fledged dispute settlement mechanism in the context of reservations, in view, among other things, of the flexible nature of the Guide to Practice. The Special Rapporteur thought it preferable that the Commission suggest a flexible mechanism of assistance in relation to reservations, one that could provide both technical advice and assistance in resolving differences concerning reservations. The main features of such a mechanism were outlined in the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained in the addendum to the seventeenth report.[21]

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5. *Encourages* States, international organizations and monitoring bodies to explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, to request any clarification that they deem useful;

6. *Recommends* that States, international organizations and monitoring bodies should, if they deem it useful, call for the full withdrawal of reservations, reconsideration of the need for a reservation and gradual reduction of the scope of a reservation through partial withdrawals, and should encourage States and international organizations that formulate reservations to do so;

7. *Encourages* States and international organizations to welcome the concerns and reactions of other States, international organizations and monitoring bodies and to address those concerns and take them duly into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

8. *Calls on* all States, international organizations and monitoring bodies to cooperate as closely as possible in order to exchange views on problematic reservations and to coordinate the measures to be taken; and

9. *Expresses* the hope that States, international organizations and monitoring bodies will initiate, undertake and pursue such dialogue in a pragmatic and transparent manner.

[21] The draft recommendation, contained in paragraph 101 of the addendum (A/CN.4/647/Add.1), read as follows:

Draft recommendation of the International Law Commission on technical assistance and assistance in the settlement of disputes concerning reservations

The International Law Commission,

Having completed preparation of the Guide to Practice on Reservations to Treaties,

Aware of the difficulties faced by States and international organizations in the interpretation, assessment of the permissibility, and implementation of reservations and objections thereto,

Attaching great importance to the principle that States should resolve their international disputes by peaceful means,

Convinced that adoption of the Guide to Practice should be supplemented by the establishment of a flexible assistance mechanism for States and international organizations that face difficulties in implementation of the legal rules applicable to reservations,

1. *Recalls* that States and international organizations that disagree as to the interpretation, permissibility or effects of a reservation or an objection to a reservation must, first of all, as with any international dispute, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice;

68. The draft introduction to the Guide to Practice, also contained in the addendum to the seventeenth report,[22] was intended to provide clarification as to the content, purposes and structure of the Guide and the legal nature of the rules formulated in the guidelines that constituted it.

(b) Action taken on the seventeenth report

69. Since the idea of a draft recommendation or conclusions on the reservations dialogue had been favourably received by the members of the Commission, the Commission instructed the Working Group on Reservations to Treaties to finalize the text in question.[23] The Commission subsequently decided to attach an annex to the Guide to Practice, containing conclusions and a recommendation on the reservations dialogue.[24]

70. Although some members had expressed doubts about the idea of proposing a specific mechanism of assistance in relation to reservations to treaties, the Commission entrusted the Working Group on Reservations to Treaties with the task of considering the draft recommendation on that subject proposed by the Special Rapporteur.[25] The Commission subsequently adopted the recommendation contained in section D below.

71. The proposal of the Special Rapporteur to preface the Guide to Practice with an introduction was favourably received by the Commission.[26]

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2. *Recommends* that a reservations and objections to reservations assistance mechanism should be established; and

3. *Suggests* that this mechanism should take the form described in the annex to this recommendation.

Annex

1. A reservations and objections to reservations assistance mechanism is hereby established.

2. The mechanism shall consist of 10 government experts, who shall be selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law.

3. The mechanism shall meet, as needed, to consider problems related to the interpretation, permissibility and effects of reservations, or objections to and acceptances of reservations, that are submitted to it by concerned States and international organizations. To that end, it may suggest that States trust it to find solutions for the resolution of their disputes. States or international organizations that are parties to a dispute concerning a reservation may undertake to accept the mechanism's proposals for its resolution as compulsory.

4. The mechanism may also provide a State or international organization with technical assistance in formulating reservations to a treaty or objections to reservations formulated by other States or international organizations.

5. In making such proposals, the mechanism shall take into account the provisions on reservations contained in the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties and the guidelines contained in the Guide to Practice.

[22] See para. 105 of the addendum (A/CN.4/647/Add.1).

[23] See paras. 59 and 60 above.

[24] See para. 61 above.

[25] See paras. 59 and 60 above.

[26] See para. 61 above.

C. Recommendation of the Commission concerning the Guide to Practice on Reservations to Treaties

72. At its 3125th meeting, on 11 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly to take note of the Guide to Practice and ensure its widest possible dissemination.

D. Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties

73. At its 3125th meeting, held on 11 August 2011, the Commission decided to transmit to the General Assembly the following recommendation:

"*The International Law Commission*,

Having completed the preparation of the Guide to Practice on Reservations to Treaties,

Aware of the difficulties faced by States in the formulation, interpretation, assessment of the permissibility, and implementation of reservations and objections thereto,

Attaching great importance to the principle that States shall settle their international disputes by peaceful means,

Considering that the adoption of the Guide to Practice could be supplemented by the establishment of flexible mechanisms to assist States in the implementation of the legal rules applicable to reservations,

Suggests that the General Assembly:

1. Consider establishing a reservations assistance mechanism, which could take the form described in the annex to this recommendation;

2. Consider establishing within its Sixth Committee an 'observatory' on reservations to treaties, and also recommend that States consider establishing similar 'observatories' at the regional and subregional levels.[27]

Annex

(i) The reservations and objections to reservations assistance mechanism could consist of a limited number of experts, selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law.

(ii) The mechanism could meet, as needed, to consider problems related to reservations, or objections to and acceptances of reservations, that would be submitted to it.

(iii) The mechanism could make proposals to requesting States in order to settle differences of view concerning reservations. States that have such differences could undertake to accept proposals for their resolution as compulsory.

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[27] Such "observatories" could draw their inspiration from the observatory established within the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI). For more information, see the Council of Europe website (www.coe.int).

(iv) The mechanism could also provide a State with technical assistance in formulating reservations to a treaty or objections to reservations formulated by other States.[28]

(v) In making its proposals, the mechanism should take into account the provisions on reservations contained in the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties and the guidelines contained in the Guide to Practice."

E. Tribute to the Special Rapporteur

74. At its 3125th meeting, on 11 August 2011, the Commission, after adopting the complete Guide to Practice on Reservations to Treaties, adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> *Having adopted* the Guide to Practice on Reservations to Treaties,
>
> *Expresses* its deep appreciation and warm congratulations to the Special Rapporteur, Mr. Alain Pellet, for the outstanding contribution he has made to the preparation of the Guide to Practice on Reservations to Treaties through his tireless efforts and devoted work, and has no doubt that the Guide to Practice will be a valuable tool in solving numerous problems posed by reservations to treaties and interpretative declarations."

F. Text of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session

1. Text of the guidelines constituting the Guide to Practice, followed by an annex on the reservations dialogue

75. The text of the guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session, followed by an annex on the reservations dialogue, is reproduced below.

Guide to Practice on Reservations to Treaties

1. Definitions

1.1 Definition of reservations

1. "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming,

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[28] The experts who would be called to assist States for the settlement of differences of view in accordance with paragraph (iii) should be different from those who would have provided assistance to one of the parties under paragraph (iv).

accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

2. Paragraph 1 is to be interpreted as including reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

1.1.1 Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed on it by the treaty, constitutes a reservation.

1.1.2 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from, but considered by the author of the statement to be equivalent to that imposed by the treaty, constitutes a reservation.

1.1.3 Reservations relating to the territorial application of the treaty

A unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 Reservations formulated when extending the territorial application of a treaty

A unilateral statement by which a State, when extending the application of a treaty to a territory, purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to that territory constitutes a reservation.

1.1.5 Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral character of that reservation.

1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement, constitutes a reservation expressly authorized by the treaty.

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

1.2.1 Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral character of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce.

1.3.1 Method of determining the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.

1.3.2 Phrasing and name

The phrasing or name of a unilateral statement provides an indication of the purported legal effect.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect of those provisions by a State or an international organization shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to its author.

1.4 Conditional interpretative declarations

1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.

2. Conditional interpretative declarations are subject to the rules applicable to reservations.

1.5 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations (including conditional interpretative declarations) are outside the scope of the present Guide to Practice.

1.5.1 Statements of non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.5.2 Statements concerning modalities of implementation of a treaty at the internal level

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without affecting its rights and obligations towards the other contracting States or contracting organizations, is outside the scope of the present Guide to Practice.

1.5.3 Unilateral statements made under a clause providing for options

1. A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in a statement by which a State or an international organization accepts, by virtue of a clause in a treaty, an obligation that is not otherwise imposed by the treaty does not constitute a reservation.

1.6 Unilateral statements in respect of bilateral treaties

1.6.1 "Reservations" to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation within the meaning of the present Guide to Practice.

1.6.2 Interpretative declarations in respect of bilateral treaties

Guidelines 1.2 and 1.4 are applicable to interpretative declarations in respect of both multilateral and bilateral treaties.

1.6.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.

1.7 Alternatives to reservations and interpretative declarations

1.7.1 Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- the insertion in the treaty of a clause purporting to limit its scope or application;
- the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effect of certain provisions of the treaty as between themselves.

1.7.2 Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- the insertion in the treaty of provisions purporting to interpret the treaty;
- the conclusion of a supplementary agreement to the same end, simultaneously or subsequently to the conclusion of the treaty.

1.8 Scope of definitions

The definitions of unilateral statements included in the present Part are without prejudice to the validity and legal effects of such statements under the rules applicable to them.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Form of reservations

A reservation must be formulated in writing.

2.1.2 Statement of reasons for reservations

A reservation should, to the extent possible, indicate the reasons why it is being formulated.

2.1.3 Representation for the purpose of formulating a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) that person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State for the purpose of formulating a reservation at the international level:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

1. The competent authority and the procedure to be followed at the internal level for formulating a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations for the purpose of invalidating the reservation.

2.1.5 Communication of reservations

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization must also be communicated to such organization.

2.1.6 Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, the communication of a reservation to a treaty shall be transmitted:

(i) if there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) if there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

2. The communication of a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. The communication of a reservation to a treaty by means other than a diplomatic note or depositary notification, such as electronic mail or facsimile, must be confirmed within an appropriate period of time by such a note or notification. In such case, the reservation is considered as having been formulated at the date of the initial communication.

2.1.7 Functions of depositaries

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been formulated on the date of its confirmation.

2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by signature its consent to be bound by the treaty.

2.2.3 Reservations formulated upon signature when a treaty expressly so provides

Where the treaty expressly provides that a State or an international organization may formulate a reservation when signing the treaty, such a reservation does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.2.4 Form of formal confirmation of reservations

The formal confirmation of a reservation must be made in writing.

2.3 Late formulation of reservations

A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

2.3.1 Acceptance of the late formulation of a reservation

Unless the treaty otherwise provides or the well-established practice followed by the depositary differs, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the twelve-month period following the date on which notification was received.

2.3.2 Time period for formulating an objection to a reservation that is formulated late

An objection to a reservation that is formulated late must be made within twelve months of the acceptance, in accordance with guideline 2.3.1, of the late formulation of the reservation.

2.3.3 Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations

A contracting State or a contracting organization cannot exclude or modify the legal effect of provisions of the treaty by:

(a) the interpretation of an earlier reservation; or

(b) a unilateral statement made subsequently under a clause providing for options.

2.3.4 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope is subject to the rules applicable to the late formulation of a reservation. If such a modification is opposed, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations

2.4.1 Form of interpretative declarations

An interpretative declaration should preferably be formulated in writing.

2.4.2 Representation for the purpose of formulating interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

2.4.3 Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations

1. The competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations for the purpose of invalidating the declaration.

2.4.4 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

2.4.5 Communication of interpretative declarations

The communication of written interpretative declarations should follow the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.6 Non-requirement of confirmation of interpretative declarations formulated when signing a treaty

An interpretative declaration formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.7 Late formulation of an interpretative declaration

Where a treaty provides that an interpretative declaration may be formulated only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently, unless none of the other contracting States and contracting organizations objects to the late formulation of the interpretative declaration.

2.4.8 Modification of an interpretative declaration

Unless the treaty otherwise provides, an interpretative declaration may be modified at any time.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time without the consent of a State or of an international organization which has accepted the reservation being required for its withdrawal.

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations

1. States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, consider the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 Representation for the purpose of withdrawing a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of withdrawing a reservation made on behalf of a State or an international organization if:

(a) that person produces appropriate full powers for the purpose of that withdrawal; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purpose without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of withdrawing a reservation at the international level on behalf of that State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted in that organization or organ;

(c) heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

1. The competent authority and the procedure to be followed at the internal level for withdrawing a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations for the purpose of invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.5.7 Effects of withdrawal of a reservation

1. The withdrawal of a reservation entails the full application of the provisions to which the reservation relates in the relations between the State or international organization

which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

2.5.9 Cases in which the author of a reservation may set the effective date of withdrawal of the reservation

The withdrawal of a reservation becomes operative on the date set by the State or international organization which withdraws the reservation, where:

(a) that date is later than the date on which the other contracting States or contracting organizations received notification of it; or

(b) the withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or contracting organizations.

2.5.10 Partial withdrawal of reservations

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, in the relations between the withdrawing State or international organization and the other parties to the treaty.

2. The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

2.5.11 Effect of a partial withdrawal of a reservation

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent provided by the new formulation of the reservation. Any objection formulated to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No new objection may be formulated to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of interpretative declarations

An interpretative declaration may be withdrawn at any time by an authority considered as representing the State or international organization for that purpose, following the same procedure applicable to its formulation.

2.6 Formulation of objections

2.6.1 Definition of objections to reservations

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

2.6.2 Right to formulate objections

A State or an international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

2.6.3 Author of an objection

An objection to a reservation may be formulated by:

(i) any contracting State or contracting organization; and

(ii) any State or international organization that is entitled to become a party to the treaty, in which case the objection does not produce any legal effect until the State or international organization has expressed its consent to be bound by the treaty.

2.6.4 Objections formulated jointly

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.5 Form of objections

An objection must be formulated in writing.

2.6.6 Right to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation

A State or an international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

2.6.7 Expression of intention to preclude the entry into force of the treaty

When a State or an international organization formulating an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.8 Procedure for the formulation of objections

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.9 Statement of reasons for objections

An objection should, to the extent possible, indicate the reasons why it is being formulated.

2.6.10 Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation

An objection to a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.11 Confirmation of an objection formulated prior to the expression of consent to be bound by a treaty

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization was a signatory to the treaty when it formulated the objection; it must be confirmed if the State or international organization had not signed the treaty.

2.6.12 Time period for formulating objections

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.13 Objections formulated late

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.12 does not produce all the legal effects of an objection formulated within that time period.

2.7 Withdrawal and modification of objections to reservations

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is presumed to have accepted that reservation.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which the author of an objection may set the effective date of withdrawal of the objection

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notice of it.

2.7.7 Partial withdrawal of an objection

1. Unless the treaty otherwise provides, a State or an international organization may partially withdraw an objection to a reservation.

2. The partial withdrawal of an objection is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent provided by the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation

1. A State or an international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.12.

2. Such a widening of the scope of the objection cannot have an effect on the existence of treaty relations between the author of the reservation and the author of the objection.

2.8 Formulation of acceptances of reservations

2.8.1 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

2.8.2 Tacit acceptance of reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.12.

2.8.3 Express acceptance of reservations

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 Form of express acceptance of reservations

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptance of reservations

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation

An express acceptance of a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.8.7 Unanimous acceptance of reservations

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such acceptance, once obtained, is final.

2.8.8 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.9 Organ competent to accept a reservation to a constituent instrument

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to:

- decide on the admission of a member to the organization; or
- amend the constituent instrument; or
- interpret this instrument.

2.8.10 Modalities of the acceptance of a reservation to a constituent instrument

1. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.11 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

2.8.12 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.13 Final nature of acceptance of a reservation

The acceptance of a reservation cannot be withdrawn or amended.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

2.9.2 Opposition to an interpretative declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization disagrees with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 Recharacterization of an interpretative declaration

1. "Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization purports to treat the declaration as a reservation.

2. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

2.9.4 Right to formulate approval or opposition, or to recharacterize

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting organization and by any State or any international organization that is entitled to become a party to the treaty.

2.9.5 Form of approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being formulated.

2.9.7 Formulation and communication of approval, opposition or recharacterization

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to an approval, opposition or recharacterization in respect of an interpretative declaration.

2.9.8 Non-presumption of approval or opposition

1. An approval of, or an opposition to, an interpretative declaration shall not be presumed.

2. Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

2.9.9 Silence with respect to an interpretative declaration

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

3. Permissibility of reservations and interpretative declarations

3.1 Permissible reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations prohibited by the treaty

A reservation is prohibited by the treaty if it contains a provision:

(a) prohibiting all reservations;

(b) prohibiting reservations to specified provisions to which the reservation in question relates; or

(c) prohibiting certain categories of reservations including the reservation in question.

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

3.1.3 Permissibility of reservations not prohibited by the treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 Permissibility of specified reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.5.5 Reservations relating to internal law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour.

3.1.5.6 Reservations to treaties containing numerous interdependent rights and obligations

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.

3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(ii) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2 Assessment of the permissibility of reservations

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- contracting States or contracting organizations;
- dispute settlement bodies;
- treaty monitoring bodies.

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.

3.2.3 Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

3.3 Consequences of the non-permissibility of a reservation

3.3.1 Irrelevance of distinction among the grounds for non-permissibility

A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

3.3.2 Non-permissibility of reservations and international responsibility

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it.

3.3.3 Absence of effect of individual acceptance of a reservation on the permissibility of the reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation.

3.4 Permissibility of reactions to reservations

3.4.1 Permissibility of the acceptance of a reservation

Acceptance of a reservation is not subject to any condition of permissibility.

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(2) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation

If a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

3.6 Permissibility of reactions to interpretative declarations

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

4. Legal effects of reservations and interpretative declarations

4.1 Establishment of a reservation with regard to another State or international organization

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

4.1.1 Establishment of a reservation expressly authorized by a treaty

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

4.1.2 Establishment of a reservation to a treaty which has to be applied in its entirety

When it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

4.1.3 Establishment of a reservation to a constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.8 to 2.8.11.

4.2 Effects of an established reservation

4.2.1 Status of the author of an established reservation

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may however be included at a date prior to the establishment of the reservation in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed.

4.2.3 Effect of the establishment of a reservation on the status of the author as a party to the treaty

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

4.2.4 Effect of an established reservation on treaty relations

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is

established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

4.2.5 Non-reciprocal application of obligations to which a reservation relates

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

4.2.6 Interpretation of reservations

A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.

4.3 Effect of an objection to a valid reservation

Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

4.3.2 Effect of an objection to a reservation that is formulated late

If a contracting State or a contracting organization to a treaty objects to a reservation whose late formulation has been unanimously accepted in accordance with guideline 2.3.1, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

4.3.3 Entry into force of the treaty between the author of a reservation and the author of an objection

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

4.3.4 Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required

If the establishment of a reservation requires the acceptance of the reservation by all the contracting States and contracting organizations, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

4.3.5 Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect

An objection by a contracting State or a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.7.

4.3.6 Effect of an objection on treaty relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

4.3.7 Effect of an objection on provisions other than those to which the reservation relates

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or international organization may, within a period of twelve months following the notification of an objection which has the effect referred to in paragraph 1, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

4.3.8 Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation

The author of a valid reservation is not required to comply with the provisions of the treaty without the benefit of its reservation.

4.4 Effect of a reservation on rights and obligations independent of the treaty

4.4.1 Absence of effect on rights and obligations under other treaties

A reservation, acceptance of a reservation or objection to a reservation neither modifies nor excludes any rights and obligations of their authors under other treaties to which they are parties.

4.4.2 Absence of effect on rights and obligations under customary international law

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

4.4.3 Absence of effect on a peremptory norm of general international law (*jus cogens*)

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

4.5 Consequences of an invalid reservation

4.5.1 Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.

4.5.2 Reactions to a reservation considered invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

4.6 Absence of effect of a reservation on the relations between the other parties to the treaty

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 Effect of interpretative declarations

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

4.7.2 Effect of the modification or the withdrawal of an interpretative declaration

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

4.7.3 Effect of an interpretative declaration approved by all the contracting States and contracting organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

5. Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States

5.1 Reservations in cases of succession of States

5.1.1 Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

5.1.2 Uniting or separation of States

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may neither formulate a new reservation nor widen the scope of a reservation that is maintained.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

5.1.3 Irrelevance of certain reservations in cases involving a uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

5.1.4 Maintenance of the territorial scope of reservations formulated by the predecessor State

Subject to the provisions of guideline 5.1.5, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

5.1.5 Territorial scope of reservations in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of a reservation in accordance with paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of paragraphs 1 to 3 apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

5.1.6 Territorial scope of reservations of the successor State in cases of succession involving part of territory

When, as a result of a succession of States involving part of the territory of a State, a treaty to which the successor State is a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of this territory.

5.1.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or a contracting organization only when notice of it has been received by that State or organization.

5.1.8 Late formulation of a reservation by a successor State

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

5.2 Objections to reservations in cases of succession of States

5.2.1 Maintenance by the successor State of objections formulated by the predecessor State

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization, unless it expresses a contrary intention at the time of the succession.

5.2.2 Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any of those States in respect of which the treaty was not in force on the date of the succession of States shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1

or 5.1.2, objections to a reservation made by another contracting State or a contracting organization shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

5.2.3 Maintenance of objections to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or by a contracting organization shall be considered as being maintained in respect of the successor State.

5.2.4 Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a State or an international organization that had not formulated an objection to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the treaty radically changes the conditions for the operation of the reservation.

5.2.5 Right of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a contracting State, a newly independent State may, in accordance with the relevant guidelines, formulate an objection to reservations formulated by a contracting State or a contracting organization, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the right provided for in paragraph 1 when making a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The right referred to in paragraphs 1 and 2 is nonetheless excluded in the case of treaties falling under guidelines 2.8.7 and 4.1.2.

5.2.6 Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected, unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

5.3 Acceptances of reservations in cases of succession of States

5.3.1 Maintenance by a newly independent State of express acceptances formulated by the predecessor State

When a newly independent State establishes its status as a contracting State to a treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

5.3.2 Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

5.3.3 Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

5.4 Legal effects of reservations, acceptances and objections in cases of succession of States

1. Reservations, acceptances and objections considered as being maintained pursuant to the guidelines contained in this Part of the Guide to Practice shall continue to produce their legal effects in conformity with the provisions of Part 4 of the Guide.

2. Part 4 of the Guide to Practice is also applicable, *mutatis mutandis*, to new reservations, acceptances and objections formulated by a successor State in conformity with the provisions of the present Part of the Guide.

5.5 Interpretative declarations in cases of succession of States

1. A successor State should clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. Paragraph 1 is without prejudice to cases in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

Annex

Conclusions on the reservations dialogue

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Taking into account the seventeenth report[29] presented by the Special Rapporteur on the topic "Reservations to treaties", which addresses the question of the reservations dialogue,

Bearing in mind the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein,

Recognizing the role that reservations to treaties may play in achieving this balance,

Concerned at the number of reservations that appear incompatible with the limits imposed by the law of treaties, in particular article 19 of the Vienna Conventions on the Law of Treaties,

Aware of the difficulties raised by the assessment of the validity of reservations,

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation,

Welcoming the efforts made in recent years, including within the framework of international organizations and human rights treaty bodies, to encourage such a dialogue,

I. Considers that:

1. States and international organizations intending to formulate reservations should do so as precisely and narrowly as possible, consider limiting their scope and ensure that they are not incompatible with the object and purpose of the treaty to which they relate;

2. In formulating a unilateral statement, States and international organizations should indicate whether it amounts to a reservation and, if so, explain why the reservation is deemed necessary and the effect it will have on the fulfilment by its author of its obligations under the treaty;

3. Statements of reasons by the author of a reservation are important for the assessment of the validity of the reservation, and States and international organizations should state the reason for any modification of a reservation;

4. States and international organizations should periodically review their reservations with a view to limiting their scope or withdrawing them where appropriate;

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[29] A/CN.4/647, paras. 2 to 68.

5. The concerns about reservations that are frequently expressed by States and international organizations, as well as monitoring bodies, may be useful for the assessment of the validity of reservations;

6. States and international organizations, as well as monitoring bodies, should explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, request any clarification that they deem useful;

7. States and international organizations, as well as monitoring bodies, if they deem it useful, should encourage the withdrawal of reservations, the reconsideration of the need for a reservation or the gradual reduction of the scope of a reservation through partial withdrawals;

8. States and international organizations should address the concerns and reactions of other States, international organizations and monitoring bodies and take them into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

9. States and international organizations, as well as monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken; and

II. Recommends that:

The General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.

2. Text of the Guide to Practice, comprising an introduction, the guidelines and commentaries thereto, an annex on the reservations dialogue and a bibliography

76. The text of the Guide to Practice on Reservations to Treaties, comprising an introduction, the guidelines and commentaries thereto, and an annex on the reservations dialogue, adopted by the Commission at its sixty-third session, is reproduced in an addendum to the present report (A/66/10/Add.1).

Chapter V
Responsibility of international organizations

A. Introduction

77. The Commission, at its fifty-fourth session (2002), decided to include the topic "Responsibility of international organizations" in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.[30] At the same session, the Commission established a Working Group on the topic. The Working Group in its report[31] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[32]

78. From its fifty-fifth (2003) to its sixty-first (2009) sessions, the Commission received and considered seven reports from the Special Rapporteur,[33] and provisionally adopted draft articles 1 to 66, taking into account the comments and observations received from Governments and international organizations.[34]

79. At its sixty-first session (2009), the Commission adopted on first reading a set of 66 draft articles on the responsibility of international organizations, together with commentaries.[35] The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments and international organizations for comments and observations.

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[30] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 461–463. At its fifty-second session (2000), the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). The General Assembly, in para. 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the report of the Commission (*ibid.*, A/55/10). The Assembly, in para. 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

[31] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 465–488.

[32] *Ibid.*, para. 464.

[33] A/CN.4/532 (first report), A/CN.4/541 (second report), A/CN.4/553 (third report), A/CN.4/564 and Add.1 and 2 (fourth report), A/CN.4/583 (fifth report), A/CN.4/597 (sixth report) and A/CN.4/610 (seventh report).

[34] Following the recommendations of the Commission (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, and corrigendum (A/57/10 and Corr.1), paras. 464 and 488; and *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52), the Secretariat, on an annual basis, circulated the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations received during the first reading, see A/CN.4/545, A/CN.4/547, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, A/CN.4/593 and Add.1, and A/CN.4/609.

[35] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 46–48.

B. Consideration of the topic at the present session

80. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/640), as well as written comments received from Governments (A/CN.4/636 and Add.1) and international organizations (A/CN.4/637 and Add.1).

81. The Commission considered the eighth report of the Special Rapporteur at its 3080th to 3085th meetings from 26 April to 6 May 2011. At its 3082nd meeting, held on 28 April 2011, the Commission referred draft articles 1 to 18 to the Drafting Committee with the instruction that the Drafting Committee commence the second reading of the draft articles taking into account the comments of Governments and international organizations, the proposals of the Special Rapporteur and the debate in the plenary on the Special Rapporteur's eighth report. At its 3085th meeting, held on 6 May 2011, the Commission further referred draft articles 19 to 66 to the Drafting Committee.

82. The Commission considered the report of the Drafting Committee (A/CN.4/L.778) at its 3097th meeting, held on 3 June 2011, and adopted the entire set of draft articles on the responsibility of international organizations, on second reading, at the same meeting (sect. E.1 below).

83. At its 3118th meeting, on 5 August 2011, the Commission adopted the commentaries to the aforementioned draft articles (sect. E.2 below).

84. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

85. At its 3119th meeting, held on 8 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly:

(a) to take note of the draft articles on the responsibility of international organizations in a resolution, and to annex them to the resolution;

(b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

D. Tribute to the Special Rapporteur

86. At its 3118th meeting, held on 5 August 2011, the Commission, after adopting the draft articles on the responsibility of international organizations, adopted the following resolution by acclamation:

> "*The International Law Commission,*
>
> *Having adopted* the draft articles on the responsibility of international organizations,
>
> *Expresses* to the Special Rapporteur, Mr. Giorgio Gaja, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the responsibility of international organizations."

E. Text of the draft articles on the responsibility of international organizations

1. Text of the draft articles

87. The text of the draft articles adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

Responsibility of international organizations

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Article 2
Use of terms

For the purposes of the present draft articles,

(a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(d) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

Article 3
Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Article 4
Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

Article 5
Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

Chapter II
Attribution of conduct to an international organization

Article 6
Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

Article 7
Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 8
Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 9
Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Chapter III
Breach of an international obligation

Article 10
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

Article 11
International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

Article 12
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 13
Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV
Responsibility of an international organization in connection with the act of a State or another international organization

Article 14
Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 15
Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 16
Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

Article 17
Circumvention of international obligations through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Article 18
Responsibility of an international organization member of another international organization

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

Article 19
Effect of this Chapter

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Chapter V
Circumstances precluding wrongfulness

Article 20
Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Article 22
Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 23
Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen

event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the organization has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

Part Three
Content of the international responsibility of an international organization

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Article 30
Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Article 32
Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Article 33
Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

Chapter II
Reparation for injury

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Article 35
Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Article 38
Interest

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Article 40
Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 41
Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Article 42
Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Part Four
The implementation of the international responsibility of an international organization

Chapter I
Invocation of the responsibility of an international organization

Article 43
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(*a*) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 44
Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Article 45
Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Article 46
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47
Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 48
Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act,

the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 49
Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 50
Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Chapter II
Countermeasures

Article 51
Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Article 52
Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in article 51 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 53
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Article 54
Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 55
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Article 56
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 57
Measures taken by States or international organizations other than an injured State or organization

This Chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

Part Five
Responsibility of a State in connection with the conduct of an international organization

Article 58
Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Article 59
Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

Article 60
Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Article 61
Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 62
Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or

(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 63
Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

Part Six
General Provisions

Article 64
Lex specialis

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 65
Questions of international responsibility not regulated by these draft articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Article 66
Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Article 67
Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

2. Text of the draft articles with commentaries thereto

88. The text of the draft articles with commentaries thereto on the responsibility of international organizations, as adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

Responsibility of international organizations

General commentary

(1) In 2001 the International Law Commission adopted a set of articles on the responsibility of States for internationally wrongful acts. As stated in those articles, they "are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization" (art. 57). Given the number of existing international organizations and their ever increasing functions, these issues appeared to be of particular importance. Thus the Commission decided in 2002 to pursue its work for the codification and the progressive development of the law of international responsibility by taking up the two questions that had been left without prejudice in article 57 on State responsibility. The present draft articles represent the result of this further study. In conducting the study the Commission has been assisted by the comments and suggestions received from States and international organizations.

(2) The scope of application of the present draft articles reflects what was left open in article 57 on State responsibility. Most of the present draft articles consider the first issue that was mentioned in that provision: the responsibility of an international organization for an act which is internationally wrongful. Only a few draft articles, mainly those contained in Part Five, consider the second issue: the responsibility of a State for the conduct of an international organization. The second issue is closely connected with the first one because the conduct in question of an international organization will generally be internationally wrongful and entail the international responsibility of the international organization concerned. However, under certain circumstances which are considered in articles 60 and 61 and the related commentaries, the conduct of an international organization may not be wrongful and no international responsibility would arise for that organization.

(3) In addressing the issue of responsibility of international organizations, the present draft articles follow the same approach adopted with regard to State responsibility. The draft articles thus rely on the basic distinction between primary rules of international law, which establish obligations for international organizations, and secondary rules, which consider the existence of a breach of an international obligation and its consequences for the responsible international organization. Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.

(4) While the present draft articles are in many respects similar to the articles on State responsibility, they represent an autonomous text. Each issue has been considered from the specific perspective of the responsibility of international organizations. Some provisions address questions that are peculiar to international organizations. When in the study of the responsibility of international organizations the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to international organizations, this is based on appropriate reasons and not on a general presumption that the same principles apply.

(5) One of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice. The main

reason for this is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it. The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the articles on State responsibility, their authority will depend upon their reception by those to whom they are addressed.

(6) The commentaries on the articles of State responsibility are generally more extensive, reflecting the greater availability of practice. When the wording of one of the present draft articles is similar or identical to an article on State responsibility, the commentary of the former will give the reasons for its adoption and the essential explanations. In so far as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles.

(7) International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound. Because of this diversity and its implications, the draft articles where appropriate give weight to the specific character of the organization, especially to its functions, as for instance article 8 on excess of authority or contravention of instructions. The provision on *lex specialis* (art. 64) has particular importance in this context. Moreover, the diversity of international organizations may affect the application of certain articles, some of which may not apply to certain international organizations in the light of their powers and functions.

(8) Certain special rules on international responsibility may apply in the relations between an international organization and its members (art. 64). These rules are specific to each organization and are usually referred to as rules of the organization. They include the constituent instrument of the organization and the rules flowing from it (art. 2). The present draft articles do not attempt to identify these special rules, but do consider the impact that they may have on the international responsibility of the organization towards its members and on the responsibility of members for the conduct of the organization. The rules of the organization do not *per se* bind non-members. However, some rules of the organization may be relevant also for non-members. For instance, in order to establish whether an international organization has expressed its consent to the commission of a given act (art. 20), it may be necessary to establish whether the organ or agent which gives its consent is competent to do so under the rules of the organization.

(9) The present draft articles are divided into Six Parts. Part One defines the scope of the articles and gives the definition of certain terms. Parts Two to Four (arts. 3 to 57) follow the general lay-out of the articles on State responsibility. Part Two sets forth the preconditions for the international responsibility of an international organization to arise. Part Three

addresses the legal consequences flowing for the responsible organization, in particular the obligation to make reparation. Part Four concerns the implementation of responsibility of an international organization, especially the question of which States or international organizations are entitled to invoke that responsibility. Part Five addresses the responsibility of States in connection with the conduct of an international organization. Finally, Part Six contains certain general provisions applicable to the whole set of draft articles.

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Commentary

(1) The definition of the scope of the draft articles in article 1 is intended to be as comprehensive and accurate as possible. While article 1 covers all the issues that are to be addressed in the following articles, this is without prejudice to any solution that will be given to those issues. Thus, for instance, the reference in paragraph 2 to the international responsibility of a State in connection with the conduct of an international organization does not imply that such a responsibility will be held to exist.

(2) For the purposes of the draft articles, the term "international organization" is defined in article 2. This definition contributes to delimiting the scope of the draft articles.

(3) An international organization's responsibility may be asserted under different systems of law. Before a national court, a natural or legal person will probably invoke the organization's responsibility or liability under some municipal law. The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not as such covered by the draft articles. This is without prejudice to the possible applicability of certain principles or rules of international law when the question of an organization's responsibility or liability arises under municipal law.

(4) Paragraph 1 of article 1 concerns the cases in which an international organization incurs international responsibility. The most frequent case will be that of the organization committing an internationally wrongful act. However, there are other instances in which an international organization's responsibility may arise. One may envisage, for example, cases analogous to those referred to in Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts.[36] An international organization may thus be held responsible if it aids or assists a State or another organization in committing an internationally wrongful act, or if it directs and controls a State or another organization in the commission of such an act, or if it coerces a State or another organization to commit an

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[36] *Yearbook ... 2001*, vol. II (Part Two), pp. 64–71.

act that would, but for the coercion, be an internationally wrongful act. Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.

(5) The reference in paragraph 1 to acts that are wrongful under international law implies that the present draft articles do not address the question of liability for injurious consequences arising out of acts not prohibited by international law. The choice made by the Commission to separate, with regard to States, the question of liability for acts not prohibited by international law from the question of international responsibility prompts a similar choice in relation to international organizations. Thus, as in the case of States, international responsibility is linked with a breach of an obligation under international law. International responsibility may thus arise from an activity that is not prohibited by international law only when a breach of an obligation under international law occurs in relation to that activity, for instance if an international organization fails to comply with an obligation to take preventive measures in relation to an activity that is not prohibited.

(6) Paragraph 2 includes within the scope of the present draft articles some issues that have been identified, but not dealt with, in the articles on responsibility of States for internationally wrongful acts. According to article 57 of those articles:

> "[they] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".[37]

The main question that was left out in the articles on responsibility of States for internationally wrongful acts, and that is considered in the present draft articles, is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization.

(7) The wording of Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts only refers to the cases in which a State aids or assists, directs and controls, or coerces another State.[38] Should the question of similar conduct by a State with regard to an international organization not be regarded as covered, at least by analogy, in the articles on responsibility of States for internationally wrongful acts, the present draft articles fill the resulting gap.

(8) Paragraph 2 does not include questions of attribution of conduct to a State, whether an international organization is involved or not. Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts deals, albeit implicitly, with attribution of conduct to a State when an international organization or one of its organs acts as a State organ, generally or only under particular circumstances. Article 4 refers to the "internal law of the State" as the main criterion for identifying State organs, and internal law will rarely include an international organization or one of its organs among State organs. However, article 4 does not consider the status of such organs under internal law as a necessary requirement.[39] Thus, an organization or one of its organs may be considered as a State organ under article 4 also when it acts as a *de facto* organ of a State. An international organization may also be, under the circumstances, as provided for in article 5, a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".[40]

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[37] *Ibid.*, p. 141.

[38] *Ibid.*, pp. 64–71.

[39] *Ibid.*, p. 40.

[40] *Ibid.*, p. 42.

Article 6 then considers the case in which an organ is "placed at the disposal of a State by another State".[41] A similar eventuality, which may or may not be considered as implicitly covered by article 6, could arise if an international organization places one of its organs at the disposal of a State. The commentary on article 6 notes that this eventuality "raises difficult questions of the relations between States and international organizations".[42] International organizations are not referred to in the commentaries on articles 4 and 5. While it appears that all questions of attribution of conduct to States are nevertheless within the scope of the responsibility of States for internationally wrongful acts, and should therefore not be considered anew, some aspects of attribution of conduct to either a State or an international organization will be further elucidated in the discussion of attribution of conduct to international organizations.

(9) The present draft articles deal with the symmetrical question of a State or a State organ acting as an organ of an international organization. This question concerns the attribution of conduct to an international organization and is therefore covered by paragraph 1 of article 1.

(10) The present draft articles do not address issues relating to the international responsibility that a State may incur towards an international organization. Although the articles on the responsibility of States for internationally wrongful acts do not mention international organizations when considering circumstances precluding wrongfulness, the content of international responsibility or the invocation of the international responsibility of a State, they may be applied by analogy also to the relation between a responsible State and an international organization. When, for instance, article 20 sets forth that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent",[43] the provision may be understood as covering by analogy also the case where a valid consent to the commission of the act of the State is given by an international organization.

Article 2
Use of terms

For the purposes of the present draft articles,

(a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(d) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

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[41] *Ibid.*, pp. 43–44.

[42] *Ibid.*, para. (9) of the commentary on article 6, p. 45.

[43] *Ibid.*, p. 72.

Commentary

(1) The definition of "international organization" given in article 2, subparagraph (a), is considered as appropriate for the purposes of the present draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following articles apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations.

(2) The fact that an international organization does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organization.

(3) Starting with the Vienna Convention on the Law of Treaties of 23 May 1969,[44] several codification conventions have succinctly defined the term "international organization" as "intergovernmental organization".[45] In each case the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 only applies to those intergovernmental organizations which have the capacity to conclude treaties.[46] No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term "intergovernmental organization" refers to the constituent instrument or to actual membership. Second, the term "intergovernmental" is in any case inappropriate to a certain extent, because several important international organizations have been established with the participation also of State organs other than governments. Third, an increasing number of international organizations include among their members entities other than States as well as States; the term "intergovernmental organization" might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations are established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for

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[44] United Nations, *Treaty Series*, vol. 1155, p. 331. The relevant provision is article 2 (1) (i).

[45] See article 1 (1) (1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, A/CONF.67/16, art. 2 (1) (n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, United Nations, *Treaty Series*, vol. 1946, p. 3; and article 2 (1) (i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15.

[46] See article 6 of the Convention (*ibid.*). As the Commission noted with regard to the corresponding draft articles:

> "Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it." *Yearbook ... 1981*, vol. II (Part Two), p. 124.

instance with regard to the Nordic Council, a treaty was subsequently concluded.[47] In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any "other instrument governed by international law". This wording is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH),[48] and the Organization of the Petroleum Exporting Countries (OPEC).[49]

(5) The reference to "a treaty or other instrument governed by international law" is not intended to exclude entities other than States from being regarded as members of an international organization. This is unproblematic with regard to international organizations which, so long as they have a treaty-making capacity, may well be a party to a constituent treaty. The situation is likely to be different with regard to entities other than States and international organizations. However, even if the entity other than a State does not possess treaty-making capacity or cannot take part in the adoption of the constituent instrument, it may be accepted as a member of the organization if the rules of that organization so provide.

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal law, unless a treaty or other instrument governed by international law has been subsequently adopted and has entered into force.[50] Thus the definition does not include organizations such as the World Conservation Union (IUCN), although over 70 States are among its members,[51] or the Institut du Monde Arabe, which was established as a foundation under French law by 20 States.[52]

(7) Article 2 also requires the international organization to possess "international legal personality". The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the United Nations Charter, which reads as follows:

> "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

The purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognize the organization's legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.[53]

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[47] The text of the Treaty of Cooperation of 23 March 1962, as amended, is available at the website of the Nordic Council: http://www.norden.org/en/publications/2005-713.

[48] See A.J. Peaslee (ed.), *International Governmental Organizations* (3rd ed.), Part III and Part IV (The Hague/Boston/London: Nijhoff, 1979), pp. 389–403.

[49] See P.J.G. Kapteyn, P.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp, *International Organization and Integration* (The Hague: Nijhoff, 1984), II.K.3.2.a.

[50] This was the case of the Nordic Council, footnote 47 above.

[51] See http://www.iucn.org.

[52] A description of the status of this organization may be found in a reply by the Minister of Foreign Affairs of France to a parliamentary question. *Annuaire Français de Droit International*, vol. 37 (1991), pp. 1024–1025.

[53] Thus in its judgement No. 149 of 18 March 1999, *Istituto Universitario Europeo v. Piette*, *Giustizia civile*, vol. 49 (1999), I, p. 1309 at p. 1313, the Italian Court of Cassation found that "the provision in an international agreement of the obligation to recognize legal personality to an organization and the

(8) The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its dicta on the legal personality of international organizations do not appear to set stringent requirements for this purpose. In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* the Court stated:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[54]

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court noted:

> "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence."[55]

While it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,[56] the Court appeared to favour the view that when legal personality of an organization exists, it is an "objective" personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles.

(10) The legal personality of an organization which is a precondition of the international responsibility of that organization needs to be "distinct from that of its member States".[57] This element is reflected in the requirement in article 2, subparagraph (a), that the international legal personality should be the organization's "own", a term that the Commission considers as synonymous with the phrase "distinct from that of its member States". The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

(11) The second sentence of article 2, subparagraph (a), seeks first of all to emphasize the role that States play in practice with regard to all the international organizations which are covered by the present articles. This key role was expressed by the International Court of

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implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States".

[54] *I.C.J. Reports 1980*, pp. 89–90, para. 37.

[55] *I.C.J. Reports 1996*, p. 78, para. 25.

[56] *I.C.J. Reports 1949*, p. 185.

[57] This wording was used by G.G. Fitzmaurice in the definition of the term "international organization" that he proposed in the context of the law of treaties, see *Yearbook ... 1956*, vol. II, p. 108, and by the Institut de Droit International in its 1995 Lisbon resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

Justice, albeit incidentally, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in the following sentence:

> "International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[58]

Many international organizations have only States as members. In other organizations, which have a different membership, the presence of States among the members is essential for the organization to be considered in the present articles.[59] This requirement is intended to be conveyed by the words "in addition to States".

(12) The fact that paragraph (a) considers that an international organization "may include as members, in addition to States, other members" does not imply that a plurality of States as members is required. Thus an international organization may be established by a State and another international organization. Examples may be provided by the Special Court for Sierra Leone[60] and the Special Tribunal for Lebanon.[61]

(13) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States Broadcasting Union, which was established by a treaty, lists "broadcasting organizations" as its full members.[62]

(14) The reference in the second sentence of article 2, subparagraph (a), to entities other than States — such as international organizations,[63] territories[64] or private entities[65] — as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

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[58] *I.C.J. Reports 1996*, p. 78, para. 25.

[59] Thus, the definition in article 2 does not cover international organizations whose membership only comprises international organizations. An example of this type of organization is given by the Joint Vienna Institute, which was established on the basis of an agreement between five international organizations. See http://www.jvi.org.

[60] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, done at Freetown, on 16 January 2002.

[61] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, annexed to Security Council resolution 1757 (2007) of 30 May 2007.

[62] See article 4 of the Convention of the Arab States Broadcasting Union. The text is reproduced in A.J. Peaslee, footnote 48 above, Part V (The Hague/Boston/London: Nijhoff, 1976), p. 24 ff.

[63] For instance, the European Community has become a member of the Food and Agriculture Organization (FAO), whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations. The amended text of the FAO Constitution may be found in P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), footnote 49 above, Supplement to vols. I.A-I.B (The Hague/Boston/London: Nijhoff, 1997), suppl. I.B.1.3.a.

[64] For instance, article 3 (d) (e) of the Constitution of the World Meteorological Organization (WMO) entitles entities other than States, referred to as "territories" or "groups of territories", to become members. *Ibid.*, suppl. I.B.1.7.a.

[65] One example is the World Tourism Organization, which includes States as "full members", "territories or groups of territories" as "associate members" and "international bodies, both intergovernmental and non-governmental" as "affiliate members". See P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), footnote 49 above, vol. I.B (The Hague/Boston/London: Nijhoff, 1982), I.B.2.3.a.

(15) International organizations within the scope of the present articles are significantly varied in their functions, type and size of membership and resources. However, since the principles and rules set forth in the articles are of a general character, they are intended to apply to all these international organizations, subject to special rules of international law that may relate to one or more international organizations. In the application of these principles and rules, the specific, factual or legal circumstances pertaining to the international organization concerned should be taken into account, where appropriate. It is clear, for example, that most technical organizations are unlikely to be ever in the position of coercing a State, or that the impact of a certain countermeasure is likely to vary greatly according to the specific character of the targeted organization.

(16) The definition of "rules of the organization" in subparagraph (b) is to a large extent based on the definition of the same term that is included in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations.[66] Apart from a few minor stylistic changes, the definition in subparagraph (b) differs from the one contained in that codification convention only because it refers, together with "decisions" and "resolutions", to "other acts of the organization". This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. The words "in particular" have nevertheless been retained, since the rules of the organization may also include such instruments as agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization. For the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, consistently with the wording of the Vienna Convention,[67] although a given organization may well possess a single constituent instrument.

(17) One important feature of the definition of "rules of the organization" in subparagraph (b) is that it gives considerable weight to practice. The influence that practice may have in shaping the rules of the organization was described in a comment by NATO, which noted that NATO was an organization where "the fundamental internal rule governing the functioning of the organization — that of consensus decision-making — is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization".[68]

(18) The definition seeks to strike a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[69]

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[66] A/CONF.129/15. Article 2, para. 1 (j) states that "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

[67] *Ibid.*

[68] A/CN.4/637, sect. II.B.26.

[69] *I.C.J. Reports 1949*, p. 180.

(19) The definition of "rules of the organization" is not intended to imply that all the rules pertaining to a given international organization are placed at the same level. The rules of the organization concerned will provide, expressly or implicitly, for a hierarchy among the different kinds of rules. For instance, the acts adopted by an international organization will generally not be able to derogate from its constituent instruments.

(20) A definition of the term "organ [of the organization]" is given in subparagraph (c). International organizations show a variety of approaches with regard to the use of this term. Some constituent instruments contain a list of organs, which may be more or less wide,[70] while in the rules of certain other organizations the term "organ" is not used.

(21) Notwithstanding this variety of approaches, it is preferable not to adopt a uniform definition which would be at odds with the rules of various organizations. The different scope that the term "organ" may have according to the rules of the organization concerned does not affect attribution of conduct to the organization, given the fact that also the conduct of agents is attributed to the organization according to article 6. Thus, subparagraph (c) refers to the rules of the organization and considers that an organ is "any person or entity which has that status according to the rules of the organization".

(22) The definition in subparagraph (c) is similar to the one of organ of State, which is given in Article 4, paragraph 2, of the articles on the responsibility of States for internationally wrongful acts. According to this text, "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State". Subparagraph (c) leaves it to the international organization concerned to define its own organs.

(23) Subparagraph (d) provides a definition of the term "agent" which is based on a passage in the advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*. When considering the capacity of the United Nations to bring a claim in case of an injury, the Court said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."[71]

(24) When the Court referred to one of the functions of the organization, it did not exclude that the agent be charged with carrying out, or helping to carry out, more than one function. The reference to "one of its functions" in subparagraph (d) should be understood in the same way.

(25) International organizations do not act only through natural persons, whether officials or not. Thus, the definition of "agent" also covers all the entities through whom the organization acts.

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[70] Examples of wider lists are provided by the constituent instruments of the Organization of American States and INTERPOL. Article 51 of the OAS Charter lists as organs the General Assembly, the Meeting of Consultations of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission of Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. According to article 5 of the Constitution of INTERPOL, the organization comprises the General Assembly, the Executive Committee, the General Secretariat, the National Central Bureaus, the Advisers and the Commission for the Control of Files. An example of a very economical list is provided by NATO. Article 9 of the North Atlantic Treaty establishes a single organ, the Council, which is given the competence to create "such subsidiary bodies as may be necessary".

[71] *I.C.J. Reports 1949*, p. 177.

(26) The definition of "agent" is of particular relevance to the question of attribution of conduct to an international organization. It is therefore preferable to develop the analysis of various aspects of this definition in the context of attribution, especially in article 6 and the related commentary.

(27) In order to avoid a possible overlap between the definition of "organ of an international organization" and that of "agent of an international organization", the latter phrase only covers persons or entities which do not come within the definition under subparagraph (c).

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

Article 3
Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Commentary

(1) The general principle, as stated in article 3, applies to whichever entity commits an internationally wrongful act. The same may be said of the principle stated in article 4.[72] The formulation of article 3 is modelled on that applicable to States according to the articles on the responsibility of States for internationally wrongful acts. There seems to be little reason for formulating these principles in another manner. It is noteworthy that in a report on peacekeeping operations the United Nations Secretary-General referred to:

> "the principle of State responsibility — widely accepted to be applicable to international organizations — that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization) [...]".[73]

(2) The wording of article 3 is identical to that of article 1 of the articles on the responsibility of States for internationally wrongful acts, but for the replacement of the word "State" with "international organization".

(3) When an international organization commits a wrongful act, its responsibility is entailed. One may find a statement of this principle in the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said:

> "[...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

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[72] *Yearbook ... 2001*, vol. II (Part Two), pp. 32 and 34. The classical analysis that led the Commission to adopt articles 1 and 2 on the responsibility of States for internationally wrongful acts is contained in Roberto Ago's Third Report on State Responsibility, *Yearbook ... 1971*, vol. II, pp. 214–223, paras. 49–75.

[73] A/51/389, p. 4, para. 6.

> "The United Nations may be required to bear responsibility for the damage arising from such acts."[74]

(4) The meaning of international responsibility is not defined in article 3, nor is it in the corresponding provisions of the articles on responsibility of States for internationally wrongful acts. There the consequences of an internationally wrongful act are dealt with in Part Two of the text, which concerns the "content of the international responsibility of a State".[75] Also in the present draft articles the content of international responsibility is addressed in further articles (Part Three).

(5) Neither for States nor for international organizations is the legal relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus in appropriate circumstances more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organization.

(6) The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both. Another example may be that of conduct which is simultaneously attributed to an international organization and a State and which entails the international responsibility of both the organization and the State.

Article 4
Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

Commentary

(1) Article 4 expresses with regard to international organizations a general principle that applies to every internationally wrongful act, whoever its author. As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term "conduct" is intended to cover both acts and omissions on the part of the international organization. The rules pertaining to attribution of conduct to an international organization are set forth in Chapter II.

(2) A second essential element, to be examined in Chapter III, is that conduct constitutes the breach of an obligation under international law. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. As the International Court of Justice noted in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, international organizations

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[74] *I.C.J. Reports 1999*, pp. 88–89, para. 66.

[75] *Yearbook ... 2001*, vol. II (Part Two), p. 86 ff.

> "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".[76]

A breach is thus possible with regard to any of these international obligations.

(3) Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an international organization to arise. In most cases an internationally wrongful act will entail material damage. However, it is conceivable that the breach of an international obligation occurs in the absence of any material damage. Whether the damage will be required or not depends on the content of the primary obligation.

Article 5
Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

Commentary

(1) By setting forth that the characterization of an act of an international organization as internationally wrongful depends on international law, article 5 adapts to international organizations a statement made for States in the first sentence of article 3 on the responsibility of States for internationally wrongful acts. This statement may appear obvious and already implied in article 4 of the present draft articles, which refers to international law for determining both whether an action or omission is attributable to an international organization and whether it constitutes a breach of an international obligation. However, the need to refer to international law in order to characterize an act as internationally wrongful is an important point which warrants a specific statement.

(2) The second sentence in article 3 on the responsibility of States for internationally wrongful acts cannot easily be adapted to the case of international organizations. When it says that the characterization of an act as wrongful under international law "is not affected by the characterization of the same act as lawful by internal law", the sentence emphasizes that internal law, which depends on the unilateral will of the State, may never justify what constitutes the breach by that State of an obligation under international law. The difficulty in stating a similar principle for international organizations arises from the fact that the rules of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; other rules of the organization may be viewed as part of international law.

(3) When the rules of the organization are part of international law they may affect the characterization of an act as internationally wrongful under international law. However, while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members.

(4) The question of the legal nature and possible effects of the rules of the organization is examined in greater detail to the commentary on article 10, concerning the existence of a breach of an international obligation.

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[76] *I.C.J. Reports 1980*, pp. 89–90, para. 37.

Chapter II
Attribution of conduct to an international organization

Commentary

(1) According to article 4 of the present articles, attribution of conduct under international law to an international organization is one condition for an international wrongful act of that international organization to arise, the other condition being that the same conduct constitutes a breach of an obligation that exists under international law for the international organization. Articles 6 to 9 below address the question of attribution of conduct to an international organization. As stated in article 4, conduct is intended to include actions and omissions.

(2) The responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization.[77] In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

(3) Like articles 4 to 11 on the responsibility of States for internationally wrongful acts,[78] articles 6 to 9 of the present articles deal with attribution of conduct, not with attribution of responsibility. Practice often focuses on attribution of responsibility rather than on attribution of conduct. This is also true of several legal instruments. For instance, Annex IX of the United Nations Convention on the Law of the Sea, after requiring that international organizations and their member States declare their respective competences with regard to matters covered by the Convention, considers in article 6 the question of attribution of responsibility in the following terms:

> "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention."[79]

Attribution of conduct to the responsible party is not necessarily implied.

(4) Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

(5) Like the articles on the responsibility of States for internationally wrongful acts, the present draft articles only provide positive criteria of attribution. Thus, they do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

(6) Articles 6 to 9 of the present draft articles cover most issues that are dealt with in regard to States in articles 4 to 11 of the articles on the responsibility of States for internationally wrongful acts. However, there is no text in the present articles covering the

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[77] Some examples are given in Chapter IV.

[78] *Yearbook ... 2001*, vol. II (Part Two), pp. 38–54.

[79] United Nations, *Treaty Series*, vol. 1833, p. 397 at p. 580.

issues addressed in articles 9 and 10 on State responsibility.[80] The latter articles relate to conduct carried out in the absence or default of the official authorities, and, to conduct of an insurrectional or other movement. These cases are unlikely to arise with regard to international organizations, because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering territory,[81] the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant a specific provision. It is, however, understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply to that organization by analogy the pertinent rule which is applicable to States, either article 9 or article 10 of the articles on responsibility of States for internationally wrongful acts.

(7) Some of the practice which addresses questions of attribution of conduct to international organizations does so in the context of issues of civil liability rather than of issues of responsibility for internationally wrongful acts. The said practice is nevertheless relevant for the purpose of attribution of conduct under international law when it states or applies a criterion that is not intended as relevant only to the specific question under consideration, but rather reflects a general understanding of how acts are attributed to an international organization.

Article 6
Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization shall apply in the determination of the functions of its organs and agents.

Commentary

(1) According to article 4 on the responsibility of States for internationally wrongful acts,[82] attribution of conduct to a State is premised on the characterization as "State organ" of the acting person or entity. However, as the commentary makes clear,[83] attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

(2) It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[84] the International Court of Justice, when dealing with the status of persons acting for the United Nations, considered relevant only the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agent" and did not consider relevant the fact that the person in question had or did not

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[80] *Yearbook ... 2001*, vol. II (Part Two), pp. 49–50.

[81] For instance, on the basis of Security Council resolution 1244 (1999) of 10 June 1999, which authorized "the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [...]".

[82] *Yearbook ... 2001*, vol. II (Part Two), p. 40.

[83] *Ibid.*, p. 42.

[84] Article 7 of the Charter of the United Nations refers to "principal organs" and to "subsidiary organs". This latter term appears also in Articles 22 and 30 of the Charter.

have an official status. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."[85]

In the later advisory opinion on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court noted that:

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials."[86]

With regard to privileges and immunities, the Court also said in the same opinion:

> "The essence of the matter lies not in their administrative position but in the nature of their mission."[87]

(3) More recently, in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court noted that in case of:

> "[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity ... [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[88]

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

(4) What was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the carrying out of the organization's functions is entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

> "As a rule, one attributes to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences."[89]

(5) The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization.

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[85] *I.C.J. Reports 1949*, p. 177. This passage was already quoted in the text corresponding to footnote 71.

[86] *I.C.J. Reports 1989*, p. 194, para. 48.

[87] *Ibid.*, p. 194, para. 47.

[88] *I.C.J. Reports 1999*, pp. 88–89, para. 66.

[89] This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes et omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences." Document VPB 61.75, published on the Swiss Federal Council's website.

(6) An organ or agent of an international organization may be an organ or agent who has been seconded by a State or another international organization. The extent to which the conduct of the seconded organ or agent has to be attributed to the receiving organization is discussed in the commentary on article 7.

(7) The requirement in paragraph 1 that the organ or agent acts "in the performance of functions of that organ or agent" is intended to make it clear that conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that organ or agent, and at any event is not attributable when the organ or agent acts in a private capacity. The question of attribution of *ultra vires* conduct is addressed in article 8.

(8) According to article 4, paragraph 1, on the responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[90] The latter specification could hardly apply to an international organization. The other elements could be retained, but it is preferable to use simpler wording, also in view of the fact that, while all States may be held to exercise all the above-mentioned functions, organizations vary significantly from one another also in this regard. Thus paragraph 1 simply states "whatever position the organ or agent holds in respect of the organization".

(9) The international organization concerned establishes which functions are entrusted to each organ or agent. This is generally done, as indicated in paragraph 2, by the "rules of the organization". By not making the rules of the organization the only criterion, the wording of paragraph 2 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

(10) Article 5 of the articles on the responsibility of States for internationally wrongful acts concerns "conduct of persons or entities exercising elements of governmental authority".[91] This terminology is generally not appropriate for international organizations. One would have to express in a different way the link that an entity may have with an international organization. It is however superfluous to put in the present draft articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 of the articles on the responsibility of States for internationally wrongful acts. The term "agent" is given in subparagraph (d) of article 2 a wide meaning that adequately covers these persons or entities.

(11) A similar conclusion may be reached with regard to the persons or groups of persons referred to in article 8 of the articles on the responsibility of States for internationally wrongful acts.[92] This provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2. As was noted above in paragraph (9) of the present commentary, in exceptional cases, a person or entity would be considered, for the purpose of attribution of conduct, as entrusted with functions of the organization, even if this was not pursuant to the rules of the organization.

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[90] *Yearbook ... 2001*, vol. II (Part Two), p. 40 and paras. (6)–(7) of the related commentary, pp. 40–41.

[91] *Ibid.*, p. 42.

[92] *Ibid.*, p. 47.

Article 7
Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Commentary

(1) When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 6 would apply. Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.[93] In this situation the problem arises whether a specific conduct of the seconded organ or agent is to be attributed to the receiving organization or to the seconding State or organization.

(2) Since the articles on the responsibility of States for internationally wrongful acts do not use the term "agent" within this context, article 7 only considers the case of an organ of a State being placed at the disposal of the organization. However, the term "organ", with reference to a State, has to be understood in a wide sense, as comprising those entities and persons whose conduct is attributable to a State according to articles 5 and 8 on the responsibility of States for internationally wrongful acts.

(3) The seconding State or organization may conclude an agreement with the receiving organization over placing an organ or agent at the latter organization's disposal. The agreement may state which State or organization would be responsible for conduct of that organ or agent. For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[94] The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.

(4) The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the

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[93] This is generally specified in the agreement that the United Nations concludes with the contributing State. See the Secretary-General's report (A/49/691), para. 6.

[94] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

receiving organization's disposal. As was noted in the comment by one State, account needs to be taken of the "full factual circumstances and particular context".[95] Article 6 of the articles on the responsibility of States for internationally wrongful acts[96] takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". However, the commentary on article 6 on the responsibility of States for internationally wrongful acts explains that, for conduct to be attributed to the receiving State, it must be "under its exclusive direction and control, rather than on instructions from the sending State".[97] At any event, the wording of article 6 cannot be replicated here, because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations.

(5) With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State.[98] In the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity — the contributing State or organization or the receiving organization — conduct has to be attributed.

(6) The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state:

> "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."[99]

This statement sums up United Nations practice relating to the United Nations Operation in the Congo (ONUC),[100] the United Nations Peacekeeping Force in Cyprus (UNFICYP)[101] and later peacekeeping forces.[102] In a recent comment, the United Nations Secretariat observed that "[f]or a number of reasons, notably political", the practice of the United Nations had been that of "maintaining the principle of United Nations responsibility vis-à-vis third parties" in connection with peacekeeping operations.[103]

(7) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters.[104] This may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line with

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[95] United Kingdom, A/C.6/64/SR.16, para. 23.

[96] *Yearbook ... 2001*, vol. II (Part Two), pp. 43–44.

[97] *Ibid.*, p. 44, para. (2) of the commentary on article 6.

[98] *Ibid.*, pp. 47–49.

[99] Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G.

[100] See the agreements providing for compensation that were concluded by the United Nations with Belgium (United Nations, *Treaty Series*, vol. 535, p. 191), Greece (*ibid.*, vol. 565, p. 3), Italy (*ibid.*, vol. 588, p. 197), Luxembourg (*ibid.*, vol. 585, p. 147) and Switzerland (*ibid.*, vol. 564, p. 193).

[101] *United Nations Juridical Yearbook* (1980), pp. 184–185.

[102] See Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), p. 4, paras. 7–8.

[103] A/CN.4/637/Add. 1, sect. II.B.3, para. 3.

[104] See above, para. (1) of present commentary and footnote 93 above.

regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora:[105]

> "Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention."[106]

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

(8) As has been held by several scholars,[107] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

> "The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United

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[105] United Nations, *Treaty Series*, vol. 993, p. 243.

[106] *United Nations Juridical Yearbook* (1994), p. 450.

[107] J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire Français de Droit International*, vol. 8 (1962), p. 427 at p. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue Egyptienne de Droit International*, vol. 32 (1976), p. 57 at pp. 62–63 and 73–79; E. Butkiewicz, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981–1982), p. 117 at pp. 123–125 and 134–135; M. Pérez González, "Les organisations internationales et le droit de la responsabilité", *Revue Générale de Droit International Public*, vol. 92 (1988), p. 63 at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64–67; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge University Press, 2005), pp. 401–403; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 379–380; I. Scobbie, "International Organizations and International Relations" in R.J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 51; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by M. Bothe, *Streitkräfte internationaler Organisationen* (Köln/Berlin: Heymanns Verlag, 1968), p. 87. Difficulties in drawing a line between operational and organizational control were underlined by L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, vol. 78 (1995), p. 881 at pp. 887–888. The Committee on Accountability of International Organizations of the International Law Association referred to a criterion of "effective control (operational command and control)", International Law Association, *Report of the Seventy-First Conference*, Berlin (2004), p. 200.

> Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."[108]

Taking the same approach, the Court of First Instance of Brussels found that the decision by the commander of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a *de facto* refugee camp at Kigali in April 1994 was "taken under the aegis of Belgium and not of UNAMIR".[109]

(9) The United Nations Secretary-General held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[110]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

(10) The European Court of Human Rights considered, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[111] its jurisdiction *ratione personae* in relation to the conduct of forces placed in Kosovo at the disposal of the United Nations (United Nations Interim Administration Mission in Kosovo (UNMIK)) or authorized by the United Nations (Kosovo Force (KFOR)). The Court referred to the present work of the International Law Commission and in particular to the criterion of "effective control" that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether "the United Nations Security Council retained ultimate authority and control so that operational command only was delegated".[112] While acknowledging "the effectiveness or unity of NATO command in *operational* matters" concerning KFOR,[113] the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN within the meaning of the word

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[108] S/1994/653, paras. 243–244, p. 45.

[109] Unpublished judgment, *Mukeshimana-Ngulinzira and others v. Belgian State and others*, para. 38. In the original French the quoted passage reads: "une décision prise sous l'égide de la Belgique et non de l'UNAMIR".

[110] A/51/389, paras. 17–18, p. 6.

[111] Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01.

[112] *Ibid.*, para. 133.

[113] *Ibid.*, para. 139.

outlined [in article 4 of the present articles]".[114] One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.[115] It is therefore not surprising that in his report of June 2008 on the United Nations Interim Administration Mission in Kosovo, the United Nations Secretary-General distanced himself from the latter criterion and stated: "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control."[116]

(11) In *Kasumaj v. Greece*[117] and *Gajić v. Germany*[118] the European Court of Human Rights reiterated its view concerning the attribution to the United Nations of conduct taken by national contingents allocated to KFOR. Likewise in *Berić and others v. Bosnia and Herzegovina*[119] the same Court quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that the conduct of the High Representative in Bosnia and Herzegovina had to be attributed to the United Nations.

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[114] *Ibid.*, para. 141.

[115] Various authors pointed out that the European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission. See C.A. Bell, "Reassessing multiple attribution: the International Law Commission and the *Behrami and Saramati* decision", *New York University Journal of International Law and Politics*, vol. 42 (2010), p. 501; P. Bodeau-Livinec, G.P. Buzzini and S. Villalpando, note, *American Journal of International Law*, vol. 102 (2008), p. 323 at pp. 328–329; P. Klein, "Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami et Saramati*", *Annuaire Français de Droit International*, vol. 53 (2007), p. 43 at p. 55; Ph. Lagrange, "Responsabilité des Etats pour actes accomplis en application du chapitre VII de la Charte des Nations Unies", *Revue Générale de Droit International Public*, vol. 112 (2008), p. 85 at pp. 94–95; C. Laly-Chevalier, "Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l'homme", *Revue Belge de Droit International*, vol. 40 (2007), p. 627 at pp. 642–644; K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *European Journal of International Law*, vol. 19 (2008), p. 509 at pp. 521–522; F. Messineo, "The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights", *Netherlands International Law Review*, vol. 56 (2009), p. 35 at pp. 39–43; M. Milanović and T. Papić, "As Bad as It Gets: The European Court of Human Rights *Behrami* and *Saramati* Decision and General International Law", *International and Comparative Law Quarterly*, vol. 58 (2009), p. 267 at pp. 283–286; A. Orakhelashvili, note, *American Journal of International Law*, vol. 102 (2008), p. 337 at p. 341; P. Palchetti, "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami* e *Saramati*", *Rivista di Diritto Internazionale*, vol. 90 (2007), p. 681 at pp. 689–690; A. Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati Cases*", *Human Rights Law Review*, vol. 8 (2008), p. 151 at p. 164; L.-A. Sicilianos, "L'(ir)responsabilité des forces multilatérales?", in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for its Implementation*; Liber Amicorum *Vera Gowlland-Debbas*, (Leiden/Boston: Brill, 2010), p. 95 at pp. 98–106; and H. Strydom, "The Responsibility of International Organisations for Conduct Arising out of Armed Conflict Situations", *South African Yearbook of International Law*, vol. 34 (2009), p. 101 at pp. 116–120.

[116] S/2008/354, para. 16.

[117] Decision of 5 July 2007 on the admissibility of application No. 6974/05.

[118] Decision of 28 August 2007 on the admissibility of application No. 31446/02.

[119] Decision of 16 October 2007 on the admissibility of applications Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

(12) Also the decision of the House of Lords in *Al-Jedda*[120] contained ample references to the present work of the Commission. One of the majority opinions stated that "[i]t was common ground between the parties that the governing principle [was] that expressed by the International Law Commission in article [7] of its draft articles on Responsibility of International Organizations".[121] The House of Lords was confronted with a claim arising from the detention of a person by British troops in Iraq. In its resolution 1546 (2004) the Security Council had previously authorized the presence of the multinational force in that country. The majority opinions appeared to endorse the views expressed by the European Court of Human Rights in *Behrami and Saramati*, but distinguished the facts of the case and concluded that it could not "realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant".[122] This conclusion appears to be in line with the way in which the criterion of effective control was intended.

(13) After the judgment of the House of Lords an application was made by Mr. Al-Jedda to the European Court of Human Rights. In *Al-Jedda v. United Kingdom* this Court quoted several texts concerning attribution, including the article (identical to the present article) which had been adopted by the Commission at first reading and some paragraphs of the commentary.[123] The Court considered that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations".[124] The Court unanimously concluded that the applicant's detention had to be attributed to the respondent State.[125]

(14) The question of attribution was also considered in a judgement of the District Court of The Hague concerning the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica. This judgment contained only a general reference to the Commission's articles.[126] The Court found that "the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent" and that "these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations".[127] The Court then considered that if "Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests."[128] The Court did not find that there was sufficient evidence for reaching such a conclusion. On appeal from the judgement of the District Court the Court of Appeal of The Hague referred to the draft article (identical to the present article) which had been adopted by the Commission at first

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[120] Decision of 12 December 2007, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence.*

[121] *Ibid.*, para. 5 of the opinion of Lord Bingham of Cornhill.

[122] Thus the opinion of Lord Bingham of Cornhill, paras. 22–24 (the quotation is taken from para. 23). Baroness Hale of Richmond (para. 124), Lord Carswell (para. 131) and Lord Brown of Eaton-under-Heywood (paras. 141–149, with his own reasons) concurred on this conclusion, while Lord Rodger of Earlsferry dissented.

[123] Judgment (Grand Chamber), 7 July 2011, http://cimskp.echr.coe.int, para. 56.

[124] *Ibid.*, para. 84. The Court found that Al-Jedda's "internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and [that] the applicant was therefore within the authority and control of the United Kingdom throughout" (para. 85).

[125] *Ibid.*, para. 3 of the operative part.

[126] Judgment of 10 September 2008, case No. 265615/HA ZA 06-1671, para. 4.8. English translation at http://zoeken.rechtspraak.nl.

[127] *Ibid.*, para. 4.11.

[128] *Ibid.*, para. 4.14.1.

reading. The Court applied the criterion of "effective control" to the circumstances of the case and reached the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica which had led to the killing of three Bosnian Muslim men after they had been evicted from the compound of Dutchbat.[129]

(15) The principles applicable to peacekeeping forces may be extended to other State organs placed at the disposal of the United Nations, such as disaster relief units, about which the United Nations Secretary-General wrote:

> "If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) [...]"[130]

(16) Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between the World Health Organization (WHO) and the Pan American Health Organization (PAHO), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[131] The Legal Counsel of WHO noted that:

> "On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO."[132]

Article 8
Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Commentary

(1) Article 8 deals with *ultra vires* conduct of organs or agents of an international organization. *Ultra vires* conduct may be within the competence of the organization, but exceed the authority of the acting organ or agent. It also may exceed the competence of the

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[129] Judgment of 5 July 2011, http://zoeken.rechtspraak.nl, especially paras. 5.8 and 5.9. The Court argued that the Netherlands had been able to prevent the removal of the victims. When giving a wide meaning to the concept of "effective control" so as to include also the ability to prevent, the Court followed the approach taken by T. Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troops Contingents as United Nations Peacekeepers", *Harvard International Law Review*, vol. 51 (2010), p. 113 at p. 157. The Court considered the possibility of a dual attribution of conduct to the State of origin and the United Nations. This solution had been advocated by C. Leck, "International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct", *Melbourne Journal of International Law*, vol. 10 (2009), p. 346 at pp. 362–364.

[130] *United Nations Juridical Yearbook* (1971), p. 187.

[131] Article 2 of the Agreement of 24 May 1949 (http://www.who.int/en/).

[132] Letter of 19 December 2003 from the Legal Counsel of WHO to the United Nations Legal Counsel, A/CN.4/545, sect. II.H.

organization,[133] in which case it will also exceed the authority of the organ or of the agent who performed it.

(2) Article 8 has to be read in the context of the other provisions relating to attribution, especially article 6. It is to be understood that, in accordance with article 6, organs and agents are persons and entities exercising functions of the organization. Apart from exceptional cases (paragraph (11) of the commentary on article 6) the rules of the organization, as defined in article 2, subparagraph (b), will govern the issue whether an organ or agent has authority to undertake a certain conduct. It is implied that instructions are relevant to the purpose of attribution of conduct only if they are binding the organ or agent. Also in this regard the rules of the organization will generally be decisive.

(3) The wording of article 8 closely follows that of article 7 on the responsibility of States for internationally wrongful acts.[134] One textual difference is due to the fact that the latter article takes the wording of articles 4 and 5 on State responsibility into account and thus considers the *ultra vires* conduct of "an organ of a State or a person or entity empowered to exercise elements of governmental authority", while the present article only needs to be aligned with article 6 and thus more simply refers to "an organ or an agent of an international organization".

(4) The key element for attribution in article 7 on the responsibility of States for internationally wrongful acts is the requirement that the organ or agent acts "in that capacity". This wording is intended to convey the need for a close link between the *ultra vires* conduct and the organ's or agent's functions. As was said in the commentary on article 7 on State responsibility, the text "indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State".[135] In order to make this point clearer, the present article expressly specifies the requirement that the organ or agent of an international organization "acts in an official capacity and within the overall functions of that organization".[136]

(5) Article 8 only concerns attribution of conduct and does not prejudice the question whether an *ultra vires* act is valid or not under the rules of the organization. Even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.

(6) The possibility of attributing to an international organization acts that an organ takes *ultra vires* has been admitted by the International Court of Justice in its advisory opinion on *Certain expenses of the United Nations*, in which the Court said:

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[133] As the International Court of Justice said in its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflicts*:

> "[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

I.C.J. Reports 1996, p. 78, para. 25.

[134] *Yearbook ... 2001*, vol. II (Part Two), p. 45.

[135] *Ibid.*, p. 46, para. (8) of the commentary on article 7.

[136] The inclusion of a reference to the functions of the organization was advocated by J.M. Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Instituto Andaluz de Administración Pública: Sevilla, 2008), pp. 211–223.

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent."[137]

The fact that the Court considered that the United Nations would have to bear expenses deriving from *ultra vires* acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct. Denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or to another organization.

(7) A distinction between the conduct of organs and officials and that of other agents would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[138] The International Court of Justice appears to have asserted the organization's responsibility for *ultra vires* acts also of persons other than officials. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court stated:

> "[...] it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."[139]

One obvious reason why an agent — in this case an expert on mission — should take care not to exceed the scope of his or her functions in order to avoid that claims be preferred against the organization is that the organization could well be held responsible for the agent's conduct.

(8) The rule stated in article 8 also finds support in the following statement of the General Counsel of the International Monetary Fund:

> "Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization."[140]

(9) Practice of international organizations confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

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[137] *I.C.J. Reports 1962*, p. 168.

[138] The Committee on Accountability of International Organizations of the International Law Association suggested the following rule:

> "The conduct of organs, officials, or agents of an IO shall be considered an act of that IO under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (*ultra vires*)."

International Law Association, *Report of the Seventy-First Conference*, Berlin (2004), p. 200.

[139] *I.C.J. Reports 1999*, p. 89, para. 66.

[140] A/CN.4/545, sect. II.H.

> "United Nations policy in regard to off-duty acts of the members of peacekeeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts [...] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peacekeeping mission was acting in a nonofficial/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may nonetheless assume an offduty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peacekeeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[141]

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[142] the "on-duty" conduct may be so attributed. One would then have to examine whether the *ultra vires* conduct in question is related to the functions entrusted to the person concerned.

(10) The fact that conduct is taken by an organ or agent off duty does not necessarily exclude the responsibility of the international organization if the latter breached an obligation of prevention that may exist under international law. This is likely to be the situation to which the Office of Legal Affairs of the United Nations referred in 1974 when it considered, with reference to off-duty conduct of members of UNEF, that "there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognise as engaging its responsibility".[143]

Article 9

Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Commentary

(1) Article 9 concerns the case in which an international organization "acknowledges and adopts" as its own a certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the "extent" reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

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[141] *United Nations Juridical Yearbook* (1986), p. 300.

[142] A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgement of 10 May 1979. *United Nations Juridical Yearbook* (1979), p. 205.

[143] This passage of an unpublished opinion was quoted in the written comment of the Secretariat of the United Nations, A/CN.4/637/Add.1, sect. II.B.4, para. 4.

(2) Article 9 mirrors the content of article 11 on the responsibility of States for internationally wrongful acts,[144] which is identically worded but for the reference to a State instead of an international organization. As the commentary on article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct "may not have been attributable".[145] In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.

(3) In certain instances of practice, relating both to States and to international organizations, it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility. This is not altogether certain, for instance, with regard to the following statement made on behalf of the European Community in the oral pleading before a WTO panel in the case *European Communities – Customs Classification of Certain Computer Equipment*. The European Community declared that it was:

> "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States".[146]

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Dragan Nikolić*. The question was raised whether the arrest of the accused was attributable to the Stabilization Force (SFOR). The Chamber first noted that the articles on responsibility of States for internationally wrongful acts were "not binding on States". It then referred to article 57 and observed that the articles were "primarily directed at the responsibility of States and not at those of international organizations or entities".[147] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand".[148] This led the Chamber to quote extensively article 11 and the related commentary.[149] The Chamber then added:

> "The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have 'acknowledged and adopted' the conduct undertaken by the individuals 'as its own'".[150]

The Chamber concluded that SFOR's conduct did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[151]

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[144] *Yearbook ... 2001*, vol. II (Part Two), p. 52.

[145] *Ibid.*, para. (1) of the commentary on article 11.

[146] Unpublished document.

[147] Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, 9 October 2002, Case No. IT-94-2-PT, para. 60.

[148] *Ibid.*, para. 61.

[149] *Ibid.*, paras. 62–63.

[150] *Ibid.*, para. 64.

[151] *Ibid.*, para. 106. The appeal was rejected on a different basis. On the point here at issue the Appeals Chamber only noted that "the exercise of jurisdiction should not be declined in case of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State or an international organization, or other entity, do not necessarily in themselves violate State sovereignty". Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, Case No. IT-94-2-AR73, para. 26.

(5) No policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption. The question may arise regarding the competence of the international organization in making that acknowledgement and adoption, and concerning which organ or agent would be competent to do so. Although the existence of a specific rule is highly unlikely, the rules of the organization govern also this issue.

Chapter III
Breach of an international obligation

Commentary

(1) Articles 6 to 9 of the present draft articles address the question of attribution of conduct to an international organization. According to article 4, attribution of conduct is one of the two conditions for an internationally wrongful act of an international organization to arise. The other condition is that the same conduct "constitutes a breach of an international obligation of that organization". This condition is examined in the present Chapter.

(2) As specified in article 4, conduct of an international organization may consist of "an action or omission". An omission constitutes a breach when the international organization is under an international obligation to take some positive action and fails to do so. A breach may also consist in an action that is inconsistent with what the international organization is required to do, or not to do, under international law.

(3) To a large extent, the four articles included in the present Chapter correspond, in their substance and wording, to articles 12 to 15 on the responsibility of States for internationally wrongful acts.[152] Those articles express principles of a general nature that appear to be applicable to the breach of an international obligation on the part of any subject of international law. There would thus be little reason to take a different approach in the present articles, although available practice relating to international organizations is limited with regard to the various issues addressed in the present Chapter.

Article 10
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of an international obligation that may arise for an international organization towards its members under the rules of the organization.

Commentary

(1) The wording of paragraph 1 corresponds to that of article 12 on the responsibility of States for internationally wrongful acts,[153] with the replacement of the term "State" with "international organization".

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[152] *Yearbook ... 2001*, vol. II (Part Two), pp. 54–64.

[153] *Ibid.*, p. 54.

(2) As in the case of State responsibility, the term "international obligation" means an obligation under international law "regardless of the origin" of the obligation concerned. As mentioned in the commentary on article 12 on the responsibility of States for internationally wrongful acts,[154] this is intended to convey that the international obligation "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order".

(3) An international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.

(4) For an international organization many obligations are likely to arise from the rules of the organization, which are defined in article 2, subparagraph (b), of the present articles as meaning "in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization". While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organization.

(5) The question may be raised whether all the obligations arising from rules of the organization are to be considered as international obligations. The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law.[155] Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law.[156] Another view, which finds support in practice, is that international organizations that have achieved a high degree of integration are a special case.[157] A further view would draw a distinction according to the source and subject matter

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[154] *Ibid.*, p. 55, para. (3) of the commentary on article 12.

[155] The theory that the "rules of the organization" are part of international law has been expounded particularly by M. Decleva, *Il diritto interno delle Unioni internazionali* (Padova: Cedam, 1962) and G. Balladore Pallieri, "Le droit interne des organisations internationales", *Recueil des Cours de l'Académie de Droit International de La Haye*, vol. 127 (1969-II), p. 1. For a recent reassertion see P. Daillier and A. Pellet, *Droit international public* (Nguyen Quoc Dinh), 7th ed. (Paris: L.G.D.J., 2002), pp. 576–577.

[156] Among the authors who defend this view: L. Focsaneanu, "Le droit interne de l'Organisation des Nations Unies", *Annuaire Français de Droit International*, vol. 3 (1957), p. 315 ff.; P. Cahier, "Le droit interne des organisations internationales", *Revue Générale de Droit International Public*, vol. 67 (1963), p. 563 ff. and J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", *Recueil des Cours ...*, vol. 179 (1983-I), p. 145 at pp. 222–225; Ch. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", ACIL Research Paper No 2011-03 (SHARES Series), www.sharesproject.nl. The distinction between international law and the internal law of international organizations was upheld also by R. Bernhardt, "Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen", *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

[157] As a model of this type of organization one could cite the European Community (now European Union), for which the European Court of Justice gave the following description in *Costa v. E.N.E.L.*, in 1964:

> "By contrast with ordinary treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the

of the rules of the organization, and exclude, for instance, certain administrative regulations from the domain of international law.

(6) The question of the nature of a particular rule of the organization was addressed by the International Court of Justice in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. In the context of the question referred to it, the Court considered the legal nature of the Constitutional Framework adopted by the Special Representative of the Secretary-General "on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10 and 11, and thus ultimately from the United Nations Charter". The Court noted:

> "The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.
>
> At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law."[158]

The Court concluded on this point that "Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion."[159]

(7) Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft articles, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from the rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law.

(8) Paragraph 2 refers to the international obligations arising "for an international organization towards its members", because these are the largest category of international obligations flowing from the rules of the organization. This reference is not intended to exclude the possibility that other rules of the organization may form part of international law.

(9) The rules of an organization may prescribe specific treatment of breaches of international obligations, also with regard to the question of the existence of a breach. This does not need to be stated in article 10, because it could be adequately covered by the

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> member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

Case 6/64, Judgment of 15 July 1964, *European Court of Justice Reports*, 1964, p. 1127 at pp. 1158–1159 (French edition).

[158] *I.C.J. Reports 2010*, paras. 88–89.

[159] *Ibid.*, para. 93.

general provision on *lex specialis* (art. 64), which points to the possible existence of special rules on any of the matters covered by the present draft articles. These special rules do not necessarily prevail over principles set out in the present draft articles. For instance, with regard to the existence of a breach of an international obligation, a special rule of the organization would not affect breaches of obligations that an international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation.

(10) As explained in the commentary on article 12 on the responsibility of States for internationally wrongful acts,[160] the reference in paragraph 1 to the character of the obligation concerns the "various classifications of international obligations".

(11) Obligations existing for an international organization may relate in a variety of ways to conduct of its member States or international organizations. For instance, an international organization may have acquired an obligation to prevent its member States from carrying out a certain conduct. In this case, the conduct of member States would not *per se* involve a breach of the obligation. The breach would consist in the failure, on the part of the international organization, to comply with its obligation of prevention. Another possible combination of the conduct of an international organization with that of its member States occurs when the organization is under an obligation to achieve a certain result, irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States.

Article 11
International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

Commentary

Given the fact that no specific issue appears to affect the application to international organizations of the principle expressed in article 13 on the responsibility of States for internationally wrongful acts,[161] the term "State" is simply replaced by "international organization" in the title and text of the present article.

Article 12
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

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[160] *Yearbook ... 2001*, vol. II (Part Two), p. 56, para. (11) of the commentary on article 12.

[161] *Yearbook ... 2001*, vol. II (Part Two), p. 57. A paragraph adopted by the ILA *Report of the Seventy-First Conference* (2004), p. 199, is similarly worded: "An act of an IO does not constitute a breach of an international obligation unless the Organisation is bound by the obligation in question at the time the act occurs."

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

Similar considerations to those made in the commentary on article 11 apply in the case of the present article. The text corresponds to that of article 14 on the responsibility of States for internationally wrongful acts,[162] with the replacement of the term "State" with "international organization".

Article 13
Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

The observation made in the commentary on article 11 also applies with regard to the present article. This corresponds to article 15 on the responsibility of States for internationally wrongful acts,[163] with the replacement of the term "State" with "international organization" in paragraph 1.

Chapter IV
Responsibility of an international organization in connection with the act of a State or another international organization

Commentary

(1) Articles 16 to 18 on the responsibility of States for internationally wrongful acts[164] cover the cases in which a State aids or assists, directs and controls, or coerces another State in the commission of an internationally wrongful act. Article 16 was described as "reflecting a customary rule" by the International Court of Justice in its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia v. Serbia*).[165] Parallel situations could be envisaged with regard to international organizations. For instance, an international organization may aid or assist a State or another international organization in the commission of an internationally wrongful act. For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State. Thus, even

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[162] *Ibid.*, p. 59.

[163] *Ibid.*, p. 62.

[164] *Ibid.*, pp. 65–69.

[165] *I.C.J. Reports 2007*, p. 150, para. 420.

if available practice with regard to international organizations is limited, there is some justification for including in the present articles provisions that are parallel to articles 16 to 18 on the responsibility of States for internationally wrongful acts.

(2) The pertinent provisions on the responsibility of States for internationally wrongful acts are based on the premise that aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under the direction or control, or under coercion. It is that State which commits an internationally wrongful act, although in the case of coercion wrongfulness could be excluded, while the other State is held responsible not for having actually committed the wrongful act but for its causal contribution to the commission of the act.

(3) The relations between an international organization and its member States or international organizations may allow the former organization to influence the conduct of members also in cases that are not envisaged in articles 16 to 18 on the responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members' conduct through non-binding acts. The consequences that this type of relation, which does not have a parallel in the relations between States, may entail with regard to an international organization's responsibility is also examined in the present Chapter.

(4) The question of an international organization's international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae*. Reference should be made in particular to the following cases: *M. & Co. v. Germany*[166] before the European Commission of Human Rights; *Cantoni v. France*,[167] *Matthews v. United Kingdom*,[168] *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*,[169] and *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*[170] before the European Court of Human Rights; and *H.v.d.P. v. Netherlands*[171] before the Human Rights Committee. In the latter case, a communication concerning the conduct of the European Patent Office was held to be inadmissible, because that conduct could not,

> "in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto".[172]

Article 14
Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and

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[166] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.

[167] Judgment of 15 November 1996, *ECHR Reports*, 1996-V, p. 161.

[168] Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 251.

[169] Decision of 10 March 2004, *ECHR Reports*, 2004-IV, p. 331.

[170] Decision of 13 September 2001 and judgment of 30 June 2005, *ECHR Reports*, 2005-VI, p. 107.

[171] Decision of 8 April 1987, communication No. 217/1986, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), p. 185.

[172] *Ibid.*, p. 186, para. 3.2.

(b) the act would be internationally wrongful if committed by that organization.

Commentary

(1) The international responsibility that an entity may incur under international law for aiding or assisting another entity in the commission of an internationally wrongful act does not appear to depend on the nature and character of the entities concerned.[173] Thus, notwithstanding the limited practice specifically relating to international organizations, the rules applicable to the relations between States should also apply when an international organization aids and assists a State or another international organization in the commission of an internationally wrongful act.

(2) Article 14 only introduces a few changes in relation to article 16 on the responsibility of States for internationally wrongful acts. The reference to the case in which a State aids or assists another State has been modified in order to refer to an international organization aiding or assisting a State or another international organization.

(3) Article 14 sets forth certain conditions for aid or assistance to give rise to the international responsibility of an aiding or assisting international organization. The first requirement is "knowledge of the circumstances of the internationally wrongful act". As was noted in the commentary on article 16 on State responsibility, if the "assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility".[174]

(4) In the commentary on article 16 on the responsibility of States for internationally wrongful acts, it is also stated as a requirement that "the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State".[175] Moreover, for international responsibility to arise, aid or assistance should contribute "significantly" to the commission of the act.[176]

(5) According to article 14, the aiding or assisting international organization only incurs international responsibility if the "act would be internationally wrongful if committed by that organization". Responsibility would be thus linked to the breach of an obligation binding on the international organization, when the organization contributed to the breach.

(6) An example of practice of aid or assistance concerning an international organization is provided by an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Forces armées de la République démocratique du Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law. The Legal Counsel wrote:

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[173] The Committee on Accountability of International Organizations of the ILA stated: "There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO." *Report of the Seventy-First Conference* (2004), pp. 200–201. This text does not refer to the conditions listed in article 14 under (a) and (b) of the present articles.

[174] *Yearbook ... 2001*, vol. II (Part Two), p. 66, para. (4).

[175] *Ibid.* para. (5).

[176] *Ibid.*

> "If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. […] MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. […] This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law."[177]

Article 15

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Commentary

(1) The text of article 15 corresponds to article 17 on the responsibility of States for internationally wrongful acts,[178] for reasons similar to those explained in the commentary on article 14 of the present draft articles. The appropriate modifications to the text have been introduced. Thus, the reference to the directing and controlling State has been replaced by that to an international organization which directs and controls; moreover, the term "State" has been replaced with "State or another international organization" in the reference to the entity which is directed and controlled.

(2) Article 15 provides that international responsibility will arise when an international organization "directs and controls a State or another organization in the commission of an internationally wrongful act".

(3) If one assumes that the Kosovo Force [KFOR] is an international organization, an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act may be taken from the French Government's preliminary objections in *Legality of Use of Force (Yugoslavia v. France)* before the International Court of Justice, when the French Government argued that:

> "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[179]

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[177] The documents were published in the New York Times, 9 December 2009, www.nytimes.com.

[178] *Yearbook ... 2001*, vol. II (Part Two), pp. 67–68.

[179] Preliminary Objections, p. 33, para. 46. The argument was made for the purpose of attributing the allegedly wrongful conduct to the international organizations concerned. A similar view with regard to NATO and KFOR was held by A. Pellet, "L'imputabilité d'éventuels actes illicites. Responsabilité

A joint exercise of direction and control was probably envisaged.

(4) In the relations between an international organization and its member States and international organizations the concept of "direction and control" could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members. The commentary on article 17 on the responsibility of States for internationally wrongful acts explains that "Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State",[180] that "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern",[181] and that "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind".[182] If one interprets the provision in the light of the passages quoted above, the adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the addressee of the decision is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act.

(5) If the adoption of a binding decision were to be regarded as a form of direction and control within the purview of the present article, this provision would overlap with article 17 of the present draft articles. The overlap would only be partial: it is sufficient to point out that article 17 also covers the case where a binding decision requires a member State or international organization to commit an act which is not unlawful for that State or international organization. In any case, the possible overlap between articles 15 and 17 would not create any inconsistency, since both provisions assert, albeit under different conditions, the international responsibility of the international organization which has taken a decision binding its member States or international organizations.

(6) The requirements set forth under subparagraphs (a) and (b) respectively refer to "knowledge of the circumstances of the internationally wrongful act" and to the fact that "the act would be internationally wrongful if committed by that organization". These requirements are identical to those listed in article 14 concerning aid or assistance in the commission of an internationally wrongful act. The same commentary applies.

Article 16
Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

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de l'OTAN ou des Etats membres", in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002), p. 193 at p. 199.

[180] *Yearbook ... 2001*, vol. II (Part Two), para. (6) of the commentary on article 17.

[181] *Ibid.*, para. (7) of the commentary on article 17.

[182] *Ibid.*

Commentary

(1) Article 16 envisages coercion on the part of the international organization in the commission of an internationally wrongful act. The nature and character of the coercing or of the coerced entities do not significantly alter the situation. Thus, one may apply also to international organizations a rule similar to article 18 on the responsibility of States for internationally wrongful acts.

(2) The text of the present article corresponds to article 18 on the responsibility of States for internationally wrongful acts,[183] with changes similar to those explained in the commentary on article 14 of the present draft articles. The reference to a coercing State has been replaced with that to an international organization; moreover, the coerced entity is not necessarily a State, but could also be an international organization. Also the title has been modified from "Coercion of another State" to "Coercion of a State or another international organization".

(3) An act of coercion need not be wrongful *per se* for international responsibility to arise for a coercing international organization. It is also not necessary that that organization would commit a wrongful act if it acted directly. What is required for international responsibility to arise is that an international organization coerces a State or another international organization in the commission of an act that would be wrongful for the coerced entity and that the coercing organization "does so with knowledge of the circumstances of the act".

(4) In the relations between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary on article 18 on the responsibility of States for internationally wrongful acts stresses that:

> "Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State."[184]

(5) Should nevertheless an international organization be considered as coercing a member State or international organization when it adopts a binding decision, there could be an overlap between the present article and article 17. The overlap would only be partial, given the different conditions set by the two provisions, and especially the fact that according to article 17 the act committed by the member State or international organization need not be unlawful for that State or that organization. To the extent that there would be an overlap, an international organization could be regarded as responsible under either article 16 or article 17. This would not give rise to any inconsistency.

Article 17
Circumvention of an international obligation through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

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[183] *Ibid.*, p. 69.

[184] *Ibid.*, para. (2) of the commentary on article 18.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Commentary

(1) The fact that an international organization is a subject of international law distinct from its members opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations. As was noted by the delegation of Austria during the debate in the Sixth Committee:

> "[...] an international organization should not be allowed to escape responsibility by 'outsourcing' its actors."[185]

(2) The Legal Counsel of WIPO considered the case of an international organization requiring a member State to commit an internationally unlawful act, and wrote:

> "[...] in the event a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law."[186]

(3) The opportunity for circumvention is likely to be higher when the conduct of the member State or international organization would not be in breach of an international obligation, for instance because the circumventing international organization is bound by a treaty with a non-member State and the same treaty does not produce effects for the organization's members.

(4) The term "circumvention" implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The evidence of such an intention will depend on the circumstances.

(5) In the case of a binding decision paragraph 1 does not stipulate as a precondition, for the international responsibility of an international organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if international responsibility arises at the time of the taking of the decision, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

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[185] A/C.6/59/SR.22, para. 24.

[186] A/CN.4/556, sect. II.N.

(6) A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgment on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, the European Court of Human Rights considered conduct that member States of the European Community take when implementing binding EC acts and observed:

> "[…] [A] State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations […] [N]umerous Convention cases […] confirm this. Each case (in particular, *Cantoni* at para. 26) concerned a review by this Court of the exercise of State discretion for which Community law provided."[187]

(7) Paragraph 1 assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations. As was noted in a statement in the Sixth Committee by the delegation of Denmark on behalf of the five Nordic countries:

> "[...] it appeared essential to find the point where the member State could be said to have so little 'room for manoeuvre' that it would seem unreasonable to make it solely responsible for certain conduct."[188]

Should on the contrary the decision allow the member State or international organization some discretion to take an alternative course which does not imply circumvention, responsibility could arise for the international organization that has taken the decision only if circumvention actually occurs, as stated in paragraph 2.

(8) Paragraph 2 covers the case in which an international organization circumvents one of its international obligations by authorizing a member State or international organization to commit a certain act. When a member State or organization is authorized to commit an act, it is apparently free not to avail itself of the authorization received. However, this may be only in theory, because an authorization often implies the conferral by an organization of certain functions to the member or members concerned so that they would exercise these functions instead of the organization. Moreover, by authorizing an act, the organization generally expects the authorization to be acted upon.

(9) While paragraph 2 uses the term "authorization", it does not require an act of an international organization to be so defined under the rules of the organization concerned. The principle expressed in paragraph 2 also applies to acts of an international organization which may be defined by different terms but present a similar character to an authorization as described above.

(10) For international responsibility to arise, the first condition in paragraph 2 is that the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations. Since the authorization may not prompt any conduct which conforms to it, a further condition laid out in paragraph 2 is that the act which is authorized is actually committed.

(11) Moreover, it is specified that the act in question be committed "because of that authorization". This condition requires a contextual analysis of the role that the authorization actually plays in determining the conduct of the member State or international organization.

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[187] *Bosphorus* case (footnote 170 above), para. 157.

[188] A/C.6/59/SR.22, para. 66.

(12) For the purposes of establishing responsibility, reliance on the authorization should not be unreasonable. The responsibility of the authorizing international organization cannot arise if, for instance, the authorization is outdated and not intended to apply to the current circumstances, because of substantial changes that have intervened since the adoption.

(13) While the authorizing international organization would be responsible if it requested, albeit implicitly, the commission of an act that would represent a circumvention of one of its obligations, that organization would clearly not be responsible for any other breach that the member State or international organization to which the authorization is addressed might commit. To that extent, the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda appears accurate:

> "[...] insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'."[189]

(14) Paragraph 3 makes it clear that, unlike articles 14 to 16, the present article does not make the international responsibility of the international organization dependent on the unlawfulness of the conduct of the member State or international organization to which the decision or authorization is addressed.

(15) As was noted in the commentaries on articles 15 and 16, when the conduct is unlawful and other conditions are fulfilled, there is the possibility of an overlap between the cases covered in those provisions and those to which article 17 applies. However, the consequence would only be the existence of alternative bases for holding an international organization responsible.

Article 18
Responsibility of an international organization member of another international organization

Without prejudice to articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in articles 61 and 62 for States that are members of an international organization.

Commentary

(1) This article is "without prejudice to articles 14 to 17" because the international responsibility of an international organization that is a member of another international organization may arise also in the cases that are envisaged in those articles. For instance, when an organization aids or assists another organization in the commission of an internationally wrongful act, the former organization may be a member of the latter.

(2) The responsibility of an international organization that is a member of another international organization may arise under additional circumstances that specifically pertain to members. Although there is no known practice relating to the responsibility of international organizations as members of another international organization, there is no reason for distinguishing the position of international organizations as members of another

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[189] Unpublished letter. "Opération Turquoise" was established by Security Council resolution S/RES/929 (1994).

international organization from that of States members of the same international organization. Since there is significant practice relating to the responsibility of member States, it seems preferable to make in the present article simply a reference to articles 61 and 62 and the related commentaries, which examine the conditions under which responsibility arises for a member State.

Article 19
Effect of this Chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Commentary

The present article is a "without prejudice" clause relating to the whole chapter. It corresponds in part to article 19 on the responsibility of States for internationally wrongful acts.[190] The latter provision intends to leave unprejudiced "the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State". References to international organizations have been added in the present article. Moreover, since the international responsibility of States committing a wrongful act is covered by the articles on the responsibility of States for internationally wrongful acts and not by the present articles, the wording of the clause has been made more general.

Chapter V
Circumstances precluding wrongfulness

Commentary

(1) Under the heading "Circumstances precluding wrongfulness" articles 20 to 27 on responsibility of States for internationally wrongful acts[191] consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,[192] these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

(2) Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.

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[190] *Yearbook ... 2001*, vol. II (Part Two), p. 70.

[191] *Ibid.*, pp. 71–86.

[192] *Ibid.*, p. 71, para. (2).

Article 20
Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Commentary

(1) Like States, international organizations perform several functions which would give rise to international responsibility were they not consented to by a State or another international organization. What is generally relevant is consent by the State on whose territory the organization's conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct.

(2) The present article corresponds to article 20 on the responsibility of States for internationally wrongful acts.[193] As the commentary explains,[194] this article "reflects the basic international law principle of consent". It concerns "consent in relation to a particular situation or a particular course of conduct", as distinguished from "consent in relation to the underlying obligation itself".[195]

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on its territory by a commission of inquiry set up by the United Nations Security Council.[196] Another example is consent by a State to the verification of the electoral process by an international organization.[197] A further, and specific, example is consent to the deployment of the Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.[198]

(4) Consent given by an international organization concerns compliance with an international obligation that exists towards that organization. It does not affect international obligations to the extent that they may also exist towards the members of the consenting organization, unless that organization has been empowered to express consent also on behalf of the members.

(5) Consent dispensing an international organization with the performance of an obligation in a particular case must be "valid". This term refers to matters "addressed by international law rules outside the framework of State responsibility"[199] or of the responsibility of an international organization, such as whether the organ or agent who gave

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[193] *Ibid.*, p. 72.

[194] *Ibid.*, p. 72, para. (1).

[195] *Ibid.*, pp. 72–73, para. (2).

[196] For the requirement of consent, see para. 6 of the Declaration annexed to General Assembly resolution 46/59 of 9 December 1991.

[197] With regard to the role of consent in relation to the function of verifying an electoral process, see the report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections (A/49/675), para. 16.

[198] A reference to the invitation by the Government of Indonesia may be found in the preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, 10 September 2005, *L* 234, p. 13.

[199] *Yearbook ... 2001*, vol. II (Part Two), p. 73, para. (4) of the commentary on article 20.

the consent was authorized to do so on behalf of the relevant State or international organization, or whether the consent was vitiated by coercion or some other factor. The competence of the consenting organ or agent will generally depend on the internal law of the State concerned or, as the case may be, on the rules of organization concerned. The requirement that consent does not affect compliance with peremptory norms is stated in article 26. This is a general provision covering all the circumstances precluding wrongfulness.

(6) The present article follows the wording of article 20 on the responsibility of States for internationally wrongful acts. The only textual changes consist in the addition of a reference to an "international organization" with regard to the entity giving consent and the replacement of the term "State" with "international organization" with regard to the entity to which consent is given.

Article 21
Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Commentary

(1) According to the commentary on the corresponding article (art. 21) on the responsibility of States for internationally wrongful acts, that article concerns "self-defence as an exception to the prohibition against the use of force".[200] The reference in that article to the "lawful" character of the measure of self-defence is explained as follows:

> "[...] the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter."[201]

(2) For reasons of coherency, the concept of self-defence which has thus been elaborated with regard to States should be used also with regard to international organizations, although it is likely to be relevant for precluding wrongfulness only of acts of a small number of organizations, such as those administering a territory or deploying an armed force.

(3) In the practice relating to United Nations forces, the term "self-defence" has often been used in a different sense, with regard to situations other than those contemplated in Article 51 of the United Nations Charter. References to "self-defence" have been made also in relation to the "defence of the mission".[202] For instance, in relation to the United Nations Protection Force (UNPROFOR), a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that:

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[200] *Ibid.*, p. 74, para. (1).

[201] *Ibid.*, p. 75, para. (6).

[202] As was noted by the High-level Panel on Threats, Challenges and Change, "the right to use force in self-defence [...] is widely understood to extend to the 'defence of the mission'". A more secure world: our shared responsibility, report of the High-level Panel on Threats, Challenges and Change (A/59/565), para. 213.

> "'self-defence' could well include the defence of the safe areas and the civilian population in those areas".[203]

While these references to "self-defence" confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases other than those in which a State or an international organization responds to an armed attack by a State. At any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also the conditions under which an international organization may resort to self-defence pertain to the primary rules and need not be examined in the present context. Those rules will set forth to what extent an international organization may invoke self-defence. One of the issues relates to the invocability of collective self-defence on the part of an international organization when one of its member States is the object of an armed attack and the international organization has the power to act in collective self-defence.[204]

(5) In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations in article 21 on the responsibility of States for internationally wrongful acts has been replaced here with a reference to international law.

Article 22
Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

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[203] *Canadian Yearbook of International Law*, vol. 34 (1996), p. 388 at p. 389.

[204] A positive answer is implied in article 25 (a) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 10 December 1999 by the member States of the Economic Community of West Africa (ECOWAS), which provides for the application of the "Mechanism" "in cases of aggression or conflict in any Member State or threat thereof". The text of this provision is reproduced by A. Ayissi (ed.), *Cooperation for Peace in West Africa. An Agenda for the 21st Century* (UNIDIR: Geneva, 2001), p. 127.

Commentary

(1) Countermeasures that an international organization may take against another international organization are dealt with in articles 51 to 57. Insofar as a countermeasure is taken in accordance with the substantive and procedural conditions set forth in those articles, the countermeasure is lawful and represents a circumstance that precludes wrongfulness of an act that, but for the fact that it is a countermeasure, would have been wrongful.

(2) The present draft articles do not examine the conditions for countermeasures to be lawful when they are taken by an injured international organization against a responsible State. Thus paragraph 1, while it refers to articles 51 to 57 insofar as countermeasures are taken against another international organization, only refers to international law for the conditions concerning countermeasures taken against States. However, one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for internationally wrongful acts.[205] It is to be noted that the conditions for lawful countermeasures in articles 51 to 57 of the present draft articles reproduce to a large extent the conditions in the articles on responsibility of States for internationally wrongful acts.

(3) Paragraphs 2 and 3 address the question whether countermeasures may be taken by an injured international organization against its members, whether States or international organizations, when they are internationally responsible towards the former organization. Sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures. The rules of the injured organization may restrict or forbid, albeit implicitly, recourse by the organization to countermeasures against its members. The question remains whether countermeasures may be taken in the absence of any express or implicit rule of the organization. Paragraph 2 sets forth the residual rule, while paragraph 3 considers countermeasures in relation to a breach by a member State or organization of an international obligation arising under the rules of the organization.

(4) Apart from the conditions that generally apply for countermeasures to be lawful, two additional conditions are listed in paragraph 2 for countermeasures by an injured international organization against its members to be lawful. First, countermeasures cannot be "inconsistent with the rules of the organization"; second, there should not be any available means that may qualify as "appropriate means […] for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation". Insofar as the responsible entity is an international organization, these obligations are set out in greater detail in Part Three of the present articles, while the obligations of a responsible State are outlined in Part Two of the articles on the responsibility of States for internationally wrongful acts.

(5) It is assumed that an international organization would have recourse to the "appropriate means" referred to in paragraph 2 before resorting to countermeasures against its members. The term "appropriate means" refers to those lawful means that are readily available and proportionate, and offer a reasonable prospect for inducing compliance at the time when the international organization intends to take countermeasures. However, failure on the part of the international organization to make timely use of remedies that were available may result in countermeasures becoming precluded.

(6) Paragraph 3 specifically addresses countermeasures by an international organization relating to the breach of an international obligation under the rules of the organization by a

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[205] *Yearbook ... 2001*, vol. II (Part Two), pp. 128–139.

member State or international organization. In this case, given the obligations of close cooperation that generally exist between an international organization and its members, countermeasures are allowed only if the rules of the organization so provide. Should they do so, they will set forth the conditions that are required for that purpose.

(7) Article 52 addresses in similar terms the reverse situation of an injured international organization or an injured State taking countermeasures against a responsible international organization of which the former organization or the State is a member.

Article 23
Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the organization has assumed the risk of that situation occurring.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 on the responsibility of States for internationally wrongful acts as "an irresistible force or [...] an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation".[206] This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

(2) There is nothing in the differences between States and international organizations that would justify the conclusion that *force majeure* is not equally relevant for international organizations or that other conditions should apply.

(3) One may find a few instances of practice concerning *force majeure*. Certain agreements concluded by international organizations provide examples to that effect. For instance, article XII, paragraph 6, of the Executing Agency Agreement of 1992 between the United Nations Development Programme (UNDP) and the World Health Organization stated that:

> "[i]n the event of *force majeure* or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from the execution of the Project. In case of such withdrawal, and unless the Parties agree otherwise, the Executing Agency shall be reimbursed the actual costs incurred up to the effective date of the withdrawal."[207]

Although this paragraph concerns withdrawal from the Agreement, it implicitly considers that non-compliance with an obligation under the Agreement because of *force majeure* does not constitute a breach of the Agreement.

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[206] *Ibid.*, p. 76.

[207] United Nations, *Treaty Series*, vol. 1691, p. 325 at p. 331.

(4) *Force majeure* has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals.[208] In Judgment No. 24, *Torres et al. v. Secretary-General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of *force majeure*, which had been made in order to justify termination of an official's contract:

> "The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature."[209]

Although the Tribunal rejected the plea, it clearly recognized the invocability of *force majeure*.

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment No. 664, in the *Barthl* case. The Tribunal found that *force majeure* was relevant to an employment contract and said:

> "*Force majeure* is an unforeseeable occurrence beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent."[210]

It is immaterial that in the actual case *force majeure* had been invoked by the employee against the international organization instead of by the organization.

(6) The text of the present article differs from that of article 23 on the responsibility of States for internationally wrongful acts only because the term "State" has been replaced once with the term "international organization" and four times with the term "organization".

Article 24
Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

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[208] These cases related to the application of the rules of the organization concerned. The question whether those rules pertain to international law has been discussed in the commentary on article 10.

[209] Para. 3 of the judgment, issued on 16 November 1976. The text is available at http://www.oas.org/tribadm/decisiones_decisions/judgements. In a letter dated 8 January 2003 to the United Nations Legal Counsel, the Organization of American States (OAS) noted that:

> "The majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary-General pursuant to his authority under the OAS Charter and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law." (see A/CN.4/545, sect. II.I).

[210] Para. 3 of the judgment, issued on 19 June 1985. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

Commentary

(1) Article 24 on the responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care".[211] The commentary gives the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during severe weather,[212] and notes that, "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases".[213]

(2) Similar situations could occur, though more rarely, with regard to an organ or agent of an international organization. Notwithstanding the absence of known cases of practice in which an international organization invoked distress, the same rule should apply both to States and to international organizations.

(3) As with regard to States, the borderline between cases of distress and those which may be considered as pertaining to necessity[214] is not always obvious. The commentary on article 24 notes that "general cases of emergencies [...] are more a matter of necessity than distress".[215]

(4) Article 24 on the responsibility of States for internationally wrongful acts only applies when the situation of distress is not due to the conduct of the State invoking distress and the act in question is not likely to create a comparable or greater peril. These conditions appear to be equally applicable to international organizations.

(5) The present article is textually identical to the corresponding article on State responsibility, with the only changes due to the replacement of the term "State" once with the term "international organization" and twice with the term "organization".

Article 25
Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

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[211] *Yearbook ... 2001*, vol. II (Part Two), p. 78.

[212] *Ibid.*, p. 79, para. (3).

[213] *Ibid.*, para. (4).

[214] Necessity is considered in the following article.

[215] *Yearbook ... 2001*, vol. II (Part Two), p. 80, para. (7).

Commentary

(1) Conditions for the invocation of necessity by States have been listed in article 25 on the responsibility of States for internationally wrongful acts.[216] In brief, the relevant conditions are as follows: the State's conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgment No. 2183 of the ILO Administrative Tribunal in the *T.O.R.N. v. CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that:

> "[...] in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care."[217]

(3) Even if practice is scarce, as was noted by the International Criminal Police Organization:

> "[...] necessity does not pertain to those areas of international law that, by their very nature, are patently inapplicable to international organizations."[218]

The invocability of necessity by international organizations was also advocated in written statements by the Commission of the European Union,[219] the International Monetary Fund,[220] the World Intellectual Property Organization,[221] the World Bank[222] and the Secretariat of the United Nations.[223]

(4) While the conditions set by article 25 on the responsibility of States for internationally wrongful acts would be applicable also with regard to international organizations, the scarcity of practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This may be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the member States and of the international

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[216] *Ibid.*, p. 80.

[217] Para. 9 of the judgment, issued on 3 February 2003. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

[218] Letter dated 9 February 2005 from the General Counsel of the International Criminal Police Organization to the Secretary of the International Law Commission (see A/CN.4/556, sect. II.M).

[219] Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[220] Letter dated 1 April 2005 from the International Monetary Fund to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[221] Letter dated 19 January 2005 from the Legal Counsel of the World Intellectual Property Organization to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[222] Letter dated 31 January 2006 from the Senior Vice-President and General Counsel of the World Bank to the Secretary of the International Law Commission (see A/CN.4/568, sect. II.E).

[223] A/CN.4/637/Add. 1, Sect. II.B.14, para. 4.

community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. Thus, when an international organization has been given powers over certain matters, it may, in the use of these powers, invoke the need to safeguard an essential interest of the international community or of its member States, provided that this is consistent with the principle of speciality. On the other hand, an international organization may invoke one of its own essential interests only if it coincides with an essential interest of the international community or of its member States. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity: the view of those who favour placing international organizations on the same level as States and the opinion of those who would totally rule out the invocability of necessity by international organizations.

(5) There is no contradiction between the reference in subparagraph (1) (a) to the protection of an essential interest of the international community and the condition in subparagraph (1) (b) that the conduct in question should not impair an essential interest of the international community. The latter interest could be different from the interest that is at the basis of the invocation of necessity.

(6) In view of the solution adopted for subparagraph (1) (a), which does not allow the invocation of necessity for the protection of the essential interests of an international organization unless they coincide with those of member States or of the international community, the essential interests of international organizations have not been added in subparagraph (1) (b) to those that should not be seriously impaired.

(7) Apart from the change in subparagraph (1) (a) the text reproduces article 25 on the responsibility of States for internationally wrongful acts, with the replacement of the term "State" with the terms "international organization" or "organization" in the chapeau of both paragraphs.

Article 26
Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) Chapter V of Part One of the articles on the responsibility of States for internationally wrongful acts contains a "without prejudice" provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision — article 26 — is to "make it clear that circumstances precluding wrongfulness in chapter V Part One do not authorise or excuse any derogation from a peremptory norm of general international law".[224]

(2) The commentary on article 26 on the responsibility of States for internationally wrongful acts states that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[225] In its judgment in the *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)*

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[224] *Yearbook ... 2001*, vol. II (Part Two), p. 85.

[225] *Ibid.*, p. 85, para. (5).

(Democratic Republic of the Congo v. Rwanda), the International Court of Justice found that the prohibition of genocide "assuredly" was a peremptory norm.[226]

(3) It is clear that, like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm. Thus, there is the need for a "without prejudice" provision matching the one applicable to States.

(4) The present article reproduces the text of article 26 on the responsibility of States for internationally wrongful acts with the replacement of the term "State" by "international organization".

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 on the responsibility of States for internationally wrongful acts makes two points.[227] The first point is that a circumstance precludes wrongfulness only if and to the extent that the circumstance exists. While the wording appears to emphasize the element of time,[228] it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

(2) The second point is that the question whether compensation is due is left unprejudiced. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.

(3) Since the position of international organizations does not differ from that of States with regard to both matters covered by article 27 on the responsibility of States for internationally wrongful acts, and no change in the wording is required in the present context, the present article is identical to the corresponding article on the responsibility of States for internationally wrongful acts.

Part Three
Content of the international responsibility of an international organization

Commentary

(1) Part Three of the present draft articles defines the legal consequences of internationally wrongful acts of international organizations. This Part is organized in three

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[226] *I.C.J. Reports 2006*, p. 32, para. 64.

[227] *Yearbook ... 2001*, vol. II (Part Two), p. 85.

[228] This temporal element may have been emphasized because the International Court of Justice had said in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives". *I.C.J. Reports 1997*, p. 63, para. 101.

chapters, which follow the general pattern of the articles on responsibility of States for internationally wrongful acts.[229]

(2) Chapter I (arts. 28 to 33) lays down certain general principles and sets out the scope of Part Three. Chapter II (arts. 34 to 40) specifies the obligation of reparation in its various forms. Chapter III (arts. 41 and 42) considers the additional consequences that are attached to internationally wrongful acts consisting of serious breaches of obligations under peremptory norms of general international law.

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Commentary

This provision has an introductory character. It corresponds to article 28 on the responsibility of States for internationally wrongful acts,[230] with the only difference that the term "international organization" replaces the term "State". There would be no justification for using a different wording in the present article.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Commentary

(1) This provision states the principle that the breach of an obligation under international law by an international organization does not *per se* affect the existence of that obligation. This is not intended to exclude that the obligation may terminate in connection with the breach: for instance, because the obligation arises under a treaty and the injured State or organization avails itself of the right to suspend or terminate the treaty in accordance with the rule in article 60 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[231]

(2) The principle that an obligation is not *per se* affected by a breach does not imply that performance of the obligation will still be possible after the breach occurs. This will depend on the character of the obligation concerned and of the breach. Should for instance an international organization be under the obligation to transfer some persons or property to a certain State, that obligation could no longer be performed once those persons or that property have been transferred to another State in breach of the obligation.

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[229] *Yearbook ... 2001*, vol. II (Part Two), pp. 86–116.

[230] *Ibid.*, p. 87.

[231] A/CONF.129/15.

(3) The conditions under which an obligation may be suspended or terminated are governed by the primary rules concerning the obligation. The same applies with regard to the possibility of performing the obligation after the breach. These rules need not be examined in the context of the law of responsibility of international organizations.

(4) With regard to the statement of the continued duty of performance after a breach, there is no reason for distinguishing between the situation of States and that of international organizations. Thus the present article uses the same wording as article 29 on the responsibility of States for internationally wrongful acts,[232] the only difference being that the term "State" is replaced by the term "international organization".

Article 30
Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) The principle that the breach of an obligation under international law does not *per se* affect the existence of that obligation, as stated in article 29, has the corollary that, if the wrongful act is continuing, the obligation still has to be complied with. Thus, the wrongful act is required to cease by the primary rule providing for the obligation.

(2) When the breach of an obligation occurs and the wrongful act continues, the main object pursued by the injured State or international organization will often be cessation of the wrongful conduct. Although a claim would refer to the breach, what would actually be sought is compliance with the obligation under the primary rule. This is not a new obligation that arises as a consequence of the wrongful act.

(3) The existence of an obligation to offer assurances and guarantees of non-repetition will depend on the circumstances of the case. For this obligation to arise, it is not necessary for the breach to be continuing. The obligation seems justified especially when the conduct of the responsible entity shows a pattern of breaches.

(4) Examples of assurances and guarantees of non-repetition given by international organizations are hard to find. However, there may be situations in which these assurances and guarantees are as appropriate as in the case of States. For instance, should an international organization be found in persistent breach of a certain obligation, guarantees of non-repetition would hardly be out of place.

(5) Assurances and guarantees of non-repetition are considered in the same context as cessation because they all concern compliance with the obligation set out in the primary rule. However, unlike the obligation to cease a continuing wrongful act, the obligation to offer assurances and guarantees of non-repetition may be regarded as a new obligation that arises as a consequence of the wrongful act, when the commission of the act signals the risk of future violations.

(6) Given the similarity of the situation of States and that of international organizations in respect of cessation and assurances and guarantees of non-repetition, the present article

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[232] *Yearbook ... 2001*, vol. II (Part Two), p. 88.

follows the same wording as article 30 on the responsibility of States for internationally wrongful acts,[233] with the replacement of the word "State" with "international organization".

Article 31
Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Commentary

(1) The present article sets out the principle that the responsible international organization is required to make full reparation for the injury caused. This principle seeks to protect the injured party from being adversely affected by the internationally wrongful act.

(2) Injury is defined as including "any damage, whether material or moral, caused by the internationally wrongful act". According to the judgment of the European Court of Justice in *Walz v. Clickair*, this wording, as it appears in paragraph 2 of article 31 on the responsibility of States for internationally wrongful acts expresses a concept which "is common to all the international law sub-systems" and expresses "the ordinary meaning to be given to the concept of damage in international law".[234]

(3) As in the case of States, the principle of full reparation is often applied in practice in a flexible manner. The injured party may be mainly interested in the cessation of a continuing wrongful act or in the non-repetition of the wrongful act. The ensuing claim to reparation may therefore be limited. This especially occurs when the injured State or organization puts forward a claim for its own benefit and not for that of individuals or entities whom it seeks to protect. However, the restraint on the part of the injured State or organization in the exercise of its rights does not generally imply that the same party would not regard itself as entitled to full reparation. Thus the principle of full reparation is not put in question.

(4) It may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law.

(5) The fact that international organizations sometimes grant compensation *ex gratia* is not due to abundance of resources, but rather to a reluctance, which organizations share with States, to admit their own international responsibility.

(6) When an international organization intends to undertake an activity in a country where its international responsibility may be engaged, one option for the organization is to conclude with the territorial State an agreement limiting its responsibility for wrongful acts occurring in relation to that activity. An example may be offered by the United Nations practice concerning peacekeeping operations, to the extent that the agreements with States

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[233] *Ibid.*

[234] Judgment of 6 May 2010, Case C-63/09, *Walz v. Clickair SA*, paras. 27–28.

on whose territory peacekeeping missions are deployed also cover claims arising out of international responsibility.[235]

(7) In setting out the principle of full reparation, the present article mainly refers to the more frequent case in which an international organization is solely responsible for an internationally wrongful act. The assertion of a duty of full reparation for the organization does not necessarily imply that the same principle applies when the organization is held responsible in connection with a certain act together with one or more States or one or more other organizations: for instance, when the organization aids or assists a State in the commission of the wrongful act.[236]

(8) The present article reproduces article 31 on the responsibility of States for internationally wrongful acts,[237] with the replacement in both paragraphs of the term "State" with "international organization".

Article 32
Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Commentary

(1) Paragraph 1 states the principle that an international organization cannot invoke its rules in order to justify non-compliance with its obligations under international law entailed by the commission of an internationally wrongful act. This principle finds a parallel in the principle that a State may not rely on its internal law as a justification for failure to comply with its obligations under Part Two of the articles on the responsibility of States for internationally wrongful acts. The text of paragraph 1 replicates article 32 on State responsibility,[238] with two changes: the term "international organization" replaces "State" and the reference to the rules of the organization replaces that to the internal law of the State.

(2) A similar approach was taken by article 27, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations,[239] which parallels the corresponding provision of the 1969 Vienna Convention on the Law of Treaties by saying that "[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty".

(3) In the relations between an international organization and a non-member State or organization, it seems clear that the rules of the former organization cannot *per se* affect the obligations that arise as a consequence of an internationally wrongful act. The same principle does not necessarily apply to the relations between an organization and its members. Rules of the organization could affect the application of the principles and rules

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[235] The Secretariat of the United Nations referred in this context to that practice. See A/CN.4/637/Add. 1, sect. II.B.16, para. 6.

[236] See article 14.

[237] *Yearbook ... 2001*, vol. II (Part Two), p. 91.

[238] *Ibid.*, p. 94.

[239] A/CONF.129/15.

set out in this Part. They may, for instance, modify the rules on the forms of reparation that a responsible organization may have to make towards its members.

(4) Rules of the organization may also affect the application of the principles and rules set out in Part Two in the relations between an international organization and its members, for instance in the matter of attribution. They would be regarded as special rules and need not be made the object of a special reference in that Part. On the contrary, in Part Three a "without prejudice" provision concerning the application of the rules of the organization in respect of members seems useful in view of the implications that may otherwise be inferred from the principle of irrelevance of the rules of the organization. The presence of such a "without prejudice" provision will serve as a reminder of the fact that the general statement in paragraph 1 may admit of exceptions in the relations between an international organization and its member States and organizations.

(5) The provision in question, which is set out in paragraph 2, only applies insofar as the obligations in Part Three relate to the international responsibility that an international organization may have towards its member States and organizations. It cannot affect in any manner the legal consequences entailed by an internationally wrongful act towards a non-member State or organization. Nor can it affect the consequences relating to breaches of obligations under peremptory norms as these breaches would affect the international community as a whole.

Article 33
Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

Commentary

(1) In the articles on the responsibility of States for internationally wrongful acts, Part One concerns any breach of an obligation under international law that may be attributed to a State, irrespectively of the nature of the entity or person to whom the obligation is owed. The scope of Part Two of those articles is limited to obligations that arise for a State towards another State. This seems to be because of the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose breaches of international obligations are not covered in Part One. The reference to responsibility existing towards the international community as a whole does not raise a similar problem, since it is hardly conceivable that the international community as a whole would incur international responsibility.

(2) Should one take a similar approach with regard to international organizations in the present draft articles, one would have to limit the scope of Part Three to obligations arising for international organizations towards other international organizations or towards the international community as a whole. However, it seems logical to include also obligations that organizations have towards States, given the existence of the articles on responsibility of States for internationally wrongful acts. As a result, Part Three of the present draft articles encompasses obligations that a responsible international organization may have towards one or more other organizations, one or more States, or the international community as a whole. This is meant to include the possibility that an international

organization incurs international responsibility, and therefore acquires the obligations set out in Part Three, towards one State and one organization, two or more States and one organization, two or more States and two more organizations, or one State and two or more organizations.

(3) With the change in the reference to the responsible entity and with the addition explained above, paragraph 1 follows the wording of article 33, paragraph 1, on State responsibility.[240]

(4) While the scope of Part Three is limited according to the definition in paragraph 1, this does not mean that obligations entailed by an internationally wrongful act do not arise towards persons or entities other than States and international organizations. Like article 33, paragraph 2, on State responsibility,[241] paragraph 2 provides that Part Three is without prejudice to any right that arises out of international responsibility and may accrue directly to those persons and entities.

(5) With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals.[242] The consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles.

Chapter II
Reparation for injury

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Commentary

(1) The above provision is identical to article 34 on the responsibility of States for internationally wrongful acts.[243] This seems justified since the forms of reparation consisting of restitution, compensation and satisfaction are applied in practice to international organizations as well as to States. Certain examples relating to international organizations are given in the commentaries to the following articles, which specifically address the various forms of reparation.

(2) A note by the Director General of the International Atomic Energy Agency (IAEA) provides an instance in which the three forms of reparation are considered to apply to a responsible international organization. Concerning the "international responsibility of the Agency in relation to safeguards", he wrote on 24 June 1970:

> "Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration only to reparation

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[240] *Yearbook ... 2001*, vol. II (Part Two), p. 94.

[241] *Ibid.*

[242] See, for instance resolution 52/247 of the General Assembly, of 26 June 1998, on "Third-party liability: temporal and financial limitations".

[243] *Yearbook ... 2001*, vol. II (Part Two), p. 95.

properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation."[244]

Article 35
Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) Restitution is a form of reparation that involves the re-establishment as far as possible of the situation which existed before the internationally wrongful act was committed by the responsible international organization.

(2) The concept and forms of restitution and the related conditions, as defined in article 35 on the responsibility of States for internationally wrongful acts,[245] appear to be applicable also to international organizations. There is no reason that would suggest a different approach with regard to the latter. The text above therefore reproduces article 35 on State responsibility, the only difference being that the term "State" is replaced by "international organization".

Article 36
Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Commentary

(1) Compensation is the form of reparation most frequently made by international organizations. The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo. Compensation to nationals of Belgium, Switzerland, Greece, Luxembourg and Italy was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States in keeping with the United Nations declaration contained in these letters according to which the United Nations:

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[244] GOV/COM.22/27, para. 27 (contained in an annex to A/CN.4/545, which is on file with the Codification Division of the Office of Legal Affairs). It has to be noted that, according to the prevailing use, which is reflected in article 34 on the responsibility of States for internationally wrongful acts and the article above, reparation is considered to include satisfaction.

[245] *Yearbook ... 2001*, vol. II (Part Two), p. 96.

> "stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties".[246]

With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France,[247] and also with the International Committee of the Red Cross.[248]

(2) The fact that such compensation was given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Permanent Representative of the Soviet Union. In this letter, the Secretary-General said:

> "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of the civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore."[249]

(3) A reference to the obligation on the United Nations to pay compensation was also made by the International Court of Justice in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.[250]

(4) There is no reason to depart from the text of article 36 on the responsibility of States for internationally wrongful acts,[251] apart from replacing the term "State" by "international organization".

Article 37
Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

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[246] United Nations, *Treaty Series*, vol. 535, p. 199; vol. 564, p. 193; vol. 565, p. 3; vol. 585, p. 147; and vol. 588, p. 197.

[247] See K. Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), pp. 314–321.

[248] The text of this agreement was reproduced by K. Ginther, *Die völkerrechtliche Verantwortlichkeit Internationaler Organisationen gegenüber Drittstaaten* (Wien/New York: Springer, 1969), pp. 166–167.

[249] *United Nations Juridical Yearbook* (1965), p. 41. The view that the United Nations placed its responsibility at the international level was maintained by J.J.A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire Français de Droit International*, vol. 11 (1965), p. 468 at pp. 483 and 487.

[250] *I.C.J. Reports 1999*, pp. 88–89, para. 66.

[251] *Yearbook ... 2001*, vol. II (Part Two), p. 98.

Commentary

(1) Practice offers some examples of satisfaction on the part of international organizations, generally in the form of an apology or an expression of regret. Although the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach.

(2) With regard to the fall of Srebrenica, the United Nations Secretary-General said:

> "The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica."[252]

(3) On 16 December 1999, upon receiving the report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, the Secretary-General stated:

> "All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse."[253]

(4) Shortly after the NATO bombing of the Chinese embassy in Belgrade, a NATO spokesman said in a press conference:

> "I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities."[254]

A further apology was addressed on 13 May 1999 by German Chancellor Gerhard Schröder on behalf of Germany, NATO and NATO Secretary-General Javier Solana to Foreign Minister Tang Jiaxuan and Premier Zhu Rongji.[255]

(5) As with regard to other forms of reparation, the rules of the responsible international organization will determine which organ or agent is competent to give satisfaction on behalf of the organization.

(6) The modalities and conditions of satisfaction that concern States are applicable also to international organizations. A form of satisfaction intended to humiliate the responsible international organization may be unlikely, but is not unimaginable. A theoretical example would be that of the request of a formal apology in terms that would be demeaning to the organization or one of its organs. The request could also refer to the conduct taken by one or more member States or organizations within the framework of the responsible organization. Although the request for satisfaction might then specifically target one or more members, the responsible organization would be asked to give it and would necessarily be affected.

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[252] Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

[253] www.un.org/News/ossg/sgsm_rwanda.htm.

[254] http://www.ess.uwe.ac.uk/kosovo/Kosovo-Mistakes2.htm.

[255] "Schroeder issues NATO apology to the Chinese", http://archives.tcm.ie/irishexaminer/1999/05/13/fhead.htm.

(7) Thus, the paragraphs of article 37 on the responsibility of States for internationally wrongful acts[256] may be transposed, with the replacement of the term "State" with "international organization" in paragraphs 1 and 3.

Article 38
Interest

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Commentary

The rules contained in article 38 on the responsibility of States for internationally wrongful acts[257] with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore, both paragraphs of article 38 on State responsibility are here reproduced without change.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Commentary

(1) No apparent reason would preclude extending to international organizations the provision set out in article 39 on the responsibility of States for internationally wrongful acts.[258] Such an extension is made in two directions: first, international organizations are also entitled to invoke contribution to the injury in order to diminish their responsibility; second, the entities that may have contributed to the injury include international organizations. The latter extension requires the addition of the words "or international organization" after "State" in the corresponding article on State responsibility.

(2) One instance of relevant practice in which contribution to the injury was invoked concerns the shooting of a civilian vehicle in the Congo. In this case compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.[259]

(3) This article is without prejudice to any obligation to mitigate the injury that the injured party may have under international law. The existence of such an obligation would arise under a primary rule. Thus, it does not need to be discussed here.

(4) The reference to "any person or entity in relation to whom reparation is sought" has to be read in conjunction with the definition given in article 33 of the scope of the

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[256] *Yearbook ... 2001*, vol. II (Part Two), p. 105.

[257] *Ibid.*, p. 107.

[258] *Ibid.*, p. 109.

[259] See P. Klein, footnote 107 above, p. 606.

international obligations set out in Part Three. This scope is limited to obligations arising for a responsible international organization towards States, other international organizations or the international community as a whole. The above reference seems appropriately worded in this context. The existence of rights that directly accrue to other persons or entities is thereby not prejudiced.

Article 40
Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

Commentary

(1) International organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their international wrongful acts. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership of a responsible organization only according to the conditions stated in articles 17, 61 and 62. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.

(2) Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly,[260] no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.[261] The same opinion was expressed in statements by the International Monetary Fund and the Organization for the Prohibition of

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[260] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 28.

[261] The delegation of the Netherlands noted that there would be "no basis for such an obligation" (A/C.6/61/SR.14, para. 23). Similar views were expressed by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, paras. 41–42); Spain (*ibid.*, paras. 52–53); France (*ibid.*, para. 63); Italy (*ibid.*, para. 66); United States of America (*ibid.*, para. 83); Belarus (*ibid.*, para. 100); Switzerland (A/C.6/61/SR.15, para. 5); Cuba (A/C.6/61/SR.16, para. 13); Romania (A/C.6/61/SR.19, para. 60). The delegation of Belarus, however, suggested that a "scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources" (A/C.6/61/SR.14, para. 100). Although sharing the prevailing view, the delegation of Argentina (A/C.6/61/SR.13, para. 49) requested the Commission to "analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case". More recently, see the statement by Belarus (A/C.6/64/SR.15, para. 36), Hungary (A/C.6/64/SR.16, para. 40), Portugal (para. 46) and Greece (para. 62) and the written comments by Germany (A/CN.4/636, sect. II.B.19, para. 3) and the Republic of Korea (A/CN.4/636/Add.1). A similar position was taken by Austria, A/CN.4/636, sect. II.B.19, para. 4. The Islamic Republic of Iran (A/C.6/64/SR.16, para. 53), while sharing the same view, maintained that "the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act".

Chemical Weapons.[262] This approach appears to conform to practice, which does not show any support for the existence of such an obligation under international law.

(3) Thus, the injured party would have to rely on the fulfilment by the responsible international organization of its obligations. It is clear that if no budget line is provided for the event that the organization incurs international responsibility, the effective fulfilment of the obligation to make reparation will be at risk. Thus paragraph 1 stresses the need for an international organization to take all appropriate measures so as to be in a position of complying with its obligations should it incur responsibility. This will generally imply that the members of the organization be requested to provide the necessary means.

(4) Paragraph 2 is essentially of an expository character. It intends to remind members of a responsible international organization that they are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

(5) In both paragraphs, the reference to the rules of the organization is meant to define the basis of the requirements in question.[263] While the rules of the organization do not necessarily deal with the matter expressly, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be implied under the relevant rules. As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion in the *Certain Expenses of the United Nations advisory opinion*:

> "Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the *Injuries to United Nations Servants* case, namely 'by necessary implication as being essential to the performance of its [i.e. the Organization's] duties' (*I.C.J. Reports 1949*, at p. 182)."[264]

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 41
Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

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[262] A/CN.4/582, sect. II.U.1. Several international organizations suggested that the Commission state an obligation for members as "an exercise of progressive development". A/CN.4/637, sect. II.B.17.

[263] See the statements by the delegations of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, para. 42); Spain (*ibid*., para. 53); France (*ibid*., para. 63); and Switzerland (A/C.6/61/SR.15, para. 5). Also the Institut de Droit International held that an obligation to put a responsible organization in funds only existed "pursuant to its Rules" (*Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 451).

[264] *I.C.J. Reports 1962*, p. 208.

Commentary

(1) The scope of Chapter III corresponds to the scope defined in article 40 on the responsibility of States for internationally wrongful acts.[265] The breach of an obligation under a peremptory norm of general international law may be less likely on the part of international organizations than on the part of States. However, the risk of such a breach cannot be entirely ruled out. It is not inconceivable, for example, that an international organization commits an aggression or infringes an obligation under a peremptory norm of general international law relating to the protection of human rights. If a serious breach does occur, it calls for the same consequences as in the case of States.

(2) The two paragraphs of the present article are identical to those of article 40 on the responsibility of States for internationally wrongful acts,[266] but for the replacement of the term "State" with "international organization".

Article 42
Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Commentary

(1) This article sets out that, should an international organization commit a serious breach of an obligation under a peremptory norm of general international law, States and international organizations have duties corresponding to those applying to States according to article 41 on the responsibility of States for internationally wrongful acts.[267] Therefore, the same wording is used here as in that article, with the addition of the words "and international organizations" in paragraph 1 and "or international organization" in paragraph 2.

(2) In response to a question raised by the Commission in its 2006 report to the General Assembly,[268] several States expressed the view that the legal situation of an international organization should be the same as that of a State having committed a similar breach.[269] Moreover, several States maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.[270]

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[265] *Yearbook ... 2001*, vol. II (Part Two), p. 112.

[266] *Ibid.*

[267] *Ibid.*, pp. 113–114.

[268] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 28.

[269] See the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid.*, para. 50); the Netherlands (A/C.6/61/SR.14, para. 25); Belgium (*ibid.*, paras. 43–46); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (A/C.6/61/SR.15, para. 8); Jordan (A/C.6/61/SR.16, para. 5); the Russian Federation (A/C.6/61/SR.18, para. 68); and Romania (A/C.6/61/SR.19, para. 60).

[270] Thus the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid.*, para. 50); the Netherlands

(3) The Organization for the Prohibition of Chemical Weapons made the following observation:

> "States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State."[271]

With regard to the obligation to cooperate on the part of international organizations, the same organization noted that an international organization "must always act within its mandate and in accordance with its rules".[272]

(4) Paragraph 1 of the present article is not designed to vest international organizations with functions that are outside their respective mandates. On the other hand, some international organizations may be entrusted with functions that go beyond what is required in the present article. This article is without prejudice to any function that an organization may have with regard to certain breaches of obligations under peremptory norms of general international law, as for example the United Nations in respect of aggression.

(5) While practice does not offer examples of cases in which the obligations stated in the present article were asserted in respect of a serious breach committed by an international organization, it is not insignificant that these obligations were considered to apply to international organizations when a breach was allegedly committed by a State.

(6) In this context it may be useful to recall that in the operative part of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the International Court of Justice first stated the obligation incumbent upon Israel to cease forthwith the works of construction of the wall and, "[g]iven the character and the importance of the rights and obligations involved", the obligation for all States "not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction".[273] The Court then added:

> "The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion."[274]

(7) Some instances of practice relating to serious breaches committed by States concern the duty of international organizations not to recognize as lawful a situation created by one of those breaches. For example, with regard to the annexation of Kuwait by Iraq, Security Council resolution 662 (1990) called upon "all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation".[275] Another

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(A/C.6/61/SR.14, para. 25); Belgium (*ibid.*, para. 45); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (A/C.6/61/SR.15, para. 8); and the Russian Federation (A/C.6/61/SR.18, para. 68).

[271] A/CN.4/582, sect. II.U.2.

[272] *Ibid.* The International Monetary Fund went one step further in saying that "any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters" (*ibid.*).

[273] See para. 159 and operative para. (3) B and D, *I.C.J. Reports 2004*, pp. 200–202.

[274] Operative para. (3) E, *I.C.J. Reports 2004*, p. 202. The same wording appears in para. 160 of the advisory opinion, *ibid.*, p. 200.

[275] Security Council resolution 662 (1990) of 9 August 1990, para. 2.

example is provided by the Declaration that the European Community and its member States made in 1991 on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". This text included the following sentence: "The Community and its member States will not recognize entities which are the result of aggression."[276]

(8) The present article concerns the obligations of States and international organizations in the event of a serious breach of an obligation under a peremptory norm of general international law by an international organization. It is not intended to exclude that similar obligations also exist for other persons or entities.

Part Four
The implementation of the international responsibility of an international organization

Commentary

(1) Part Four of the present articles concerns the implementation of the international responsibility of international organizations. This Part is subdivided into two chapters, according to the general pattern of the articles on the responsibility of States for internationally wrongful acts.[277] Chapter I deals with the invocation of international responsibility and with certain associated issues. These do not include questions relating to remedies that may be available for implementing international responsibility. Chapter II considers countermeasures taken in order to induce the responsible international organization to cease the unlawful conduct and to provide reparation.

(2) Issues relating to the implementation of international responsibility are here considered insofar as they concern the invocation of the responsibility of an international organization. Thus, while the present draft articles consider the invocation of responsibility by a State or an international organization, they do not address questions relating to the invocation of responsibility of States.[278] However, one provision (art. 48) refers to the case in which the responsibility of one or more States is concurrent with that of one or more international organizations for the same wrongful act.

Chapter I
Invocation of the responsibility of an international organization

Article 43
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

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[276] European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, reproduced in *International Legal Materials*, vol. 31 (1992), p. 1485 at p. 1487.

[277] *Yearbook ... 2001*, vol. II (Part Two), pp. 116–139.

[278] See article 1 and in particular para. (10) of the related commentary.

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) The present article defines when a State or an international organization is entitled to invoke responsibility as an injured State or international organization. This implies the entitlement to claim from the responsible international organization compliance with the obligations that are set out in Part Three.

(2) Subparagraph (a) addresses the more frequent case of responsibility arising for an international organization: that of a breach of an obligation owed to a State or another international organization individually. This subparagraph corresponds to article 42 (a) on the responsibility of States for internationally wrongful acts.[279] It seems clear that the conditions for a State to invoke responsibility as an injured State cannot vary according to the fact that the responsible entity is another State or an international organization. Similarly, when an international organization owes an obligation to another international organization individually, the latter organization has to be regarded as entitled to invoke responsibility as an injured organization in case of breach.

(3) Practice concerning the entitlement of an international organization to invoke international responsibility because of the breach of an obligation owed to that organization individually mainly concerns breaches of obligations that are committed by States. Since the present draft articles do not address questions relating to the invocation of responsibility of States, this practice is here relevant only indirectly. The obligations breached to which practice refers were imposed either by a treaty or by general international law. It was in the latter context that in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* the International Court of Justice stated that it was "established that the Organization has capacity to bring claims on the international plane".[280] Also in the context of breaches of obligations under general international law that were committed by a State the Governing Council of the United Nations Compensation Commission envisaged compensation "with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait".[281] On this basis, several entities that were expressly defined as international organizations were, as a result of their claims, awarded compensation by the panel of commissioners: the Arab Planning Institute, the Inter-Arab Investment Guarantee Corporation, the Gulf Arab States Educational Research Center, the Arab Fund for Economic and Social Development, the Joint Program Production Institution for the Arab Gulf Countries and the Arab Towns Organization.[282]

(4) According to article 42 (b) on the responsibility of States for internationally wrongful acts, a State may invoke responsibility as an injured State also when the obligation breached is owed to a group of States or to the international community as a whole, and the breach of the obligation (i) specially affects that State, or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with regard to the further performance of the obligation.[283] The related commentary

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[279] *Yearbook ... 2001*, vol. II (Part Two), p. 117.

[280] *I.C.J. Reports 1949*, pp. 184–185.

[281] S/AC.26/1991/7/Rev.1, para. 34.

[282] "Report and Recommendations made by the Panel of Commissioners concerning the Sixth Instalment of 'F1' Claims", S/AC.26/2002/6, paras. 213–371.

[283] *Yearbook ... 2001*, vol. II (Part Two), p. 117.

gives as an example for the first category a coastal State that is particularly affected by the breach of an obligation concerning pollution of the high seas;[284] for the second category, the party to a disarmament treaty or "any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others".[285]

(5) Breaches of this type, which rarely affect States, are even less likely to be relevant for international organizations. However, one cannot rule out that an international organization may commit a breach that falls into one or the other category and that a State or an international organization may then be entitled to invoke responsibility as an injured State or international organization. It is therefore preferable to include in the present article the possibility that a State or an international organization may invoke responsibility of an international organization as an injured State or international organization under similar circumstances. This is provided in subparagraph (b) (i) and (ii).

(6) While the chapeau of the present article refers to "the responsibility of another international organization", this is due to the fact that the text cumulatively considers invocation of responsibility by a State or an international organization. The reference to "another" international organization is not intended to exclude the case that a State is injured and only one international organization — the responsible organization — is involved. Nor does the reference to "a State" and to "an international organization" in the same chapeau imply that more than one State or international organization may not be injured by the same internationally wrongful act.

(7) Similarly, the reference in subparagraph (b) to "a group of States or international organizations" does not necessarily imply that the group should comprise both States and international organizations or that there should be a plurality of States or international organizations. Thus, the text is intended to include the following cases: that the obligation breached is owed by the responsible international organization to a group of States; that it is owed to a group of other organizations; that it is owed to a group comprising both States and organizations, but not necessarily a plurality of either.

Article 44
Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Commentary

(1) This article corresponds to article 43 on the responsibility of States for internationally wrongful acts.[286] With regard to notice of claim for invoking international responsibility of an international organization, there would be little reason for envisaging different modalities from those that are applicable when an injured State invokes the

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[284] *Ibid.*, p. 119, para. (12).

[285] *Ibid.*, p. 119, para. (13).

[286] *Ibid.*, p. 119.

responsibility of another State. Moreover, the same rule should apply whether the entity invoking responsibility is a State or an international organization.

(2) Paragraph 1 does not specify what form the invocation of responsibility should take. The fact that, according to paragraph 2, the State or international organization invoking responsibility may specify some elements, and in particular "what form reparation should take", does not imply that the responsible international organization is bound to conform to those specifications.

(3) While paragraph 1 refers to the responsible international organization as "another international organization", this does not mean that, when the entity invoking responsibility is a State, more than one international organization needs to be involved.

(4) Although the present article refers to "an injured State or international organization", according to article 49, paragraph 5, the same rule applies to notice of claim when a State or an international organization is entitled to invoke responsibility without being an injured State or international organization within the definition of article 43.

Article 45
Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Commentary

(1) This article corresponds to article 44 on the responsibility of States for internationally wrongful acts.[287] It concerns the admissibility of certain claims that States or international organizations may make when invoking the international responsibility of an international organization. Paragraph 1 deals with those claims that are subject to the rule on nationality of claims, while paragraph 2 relates to the claims to which the local remedies rule applies.

(2) Nationality of claims is a requirement applying to States exercising diplomatic protection. Although article 1 of the articles on diplomatic protection defines that institution with regard to the invocation by a State of the responsibility of another State "for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State", this definition is made "for the purposes of the [...] draft articles".[288] The reference only to the relations between States is understandable in view of the fact that generally diplomatic protection is relevant in that context.[289] However, diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State

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[287] *Ibid.*, p. 120.

[288] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 16.

[289] It was also in the context of a dispute between two States that the International Court of Justice found in its judgment on the preliminary objections in the *Ahmadou Sadio Diallo* case that the definition provided in article 1 on diplomatic protection reflected "customary international law"; *I.C.J. Reports 2007*, para. 39 (available at http://www.icj-cij.org/docket/files/103/13856.pdf).

and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.

(3) The requirement that a person be a national for diplomatic protection to be admissible is already implied in the definition quoted in the previous paragraph. It is expressed in article 3, paragraph 1, on diplomatic protection in the following terms: "The State entitled to exercise diplomatic protection is the State of nationality."[290]

(4) Paragraph 1 of the present article only concerns the exercise of diplomatic protection by a State. When an international organization prefers a claim against another international organization no requirement concerning nationality applies. With regard to the invocation of the responsibility of a State by an international organization, the International Court of Justice stated in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* that "the question of nationality is not pertinent to the admissibility of the claim".[291]

(5) Paragraph 2 relates to the local remedies rule. Under international law, this rule does not apply only to claims concerning diplomatic protection, but also to claims relating to respect for human rights.[292] The local remedies rule does not apply in the case of functional protection,[293] when an international organization acts in order to protect one of its officials or agents in relation to the performance of his or her mission, although an organization may include in its claim also "the damage suffered by the victim or by persons entitled through him", as the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.[294]

(6) With regard to a responsible international organization, the need to exhaust local remedies depends on the circumstances of the claim. Provided that the requirement applies in certain cases, there is no need to define here more precisely when the local remedies rule would be applicable. One clear case appears to be that of a claim in respect of the treatment of an individual by an international organization while administering a territory. The local remedies rule has also been invoked with regard to remedies existing within the European Union. One instance of practice is provided by a statement made on behalf of all the member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization in relation to a dispute between those States and the United States concerning measures taken for abating noise originating from aircraft. The member States of the European Union contended that the claim of the United States was inadmissible because remedies relating to the controversial EC regulation had not been exhausted, since the measure was at the time "subject to challenge before the national courts of EU Member States and the European

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[290] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 17.

[291] *I.C.J. Reports 1949*, p. 186.

[292] See especially A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge University Press, 1983), pp. 46–56; C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 64–75; R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Torino: Giappichelli, 2004). These authors focus on the exhaustion of local remedies with regard to claims based on human rights treaties.

[293] This point was stressed by C.F. Amerasinghe, footnote 107 above, p. 484, and J. Verhoeven, "Protection diplomatique, épuisement des voies de recours et juridictions européennes", *Droit du pouvoir, pouvoir du droit – Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), p. 1511 at p. 1517.

[294] *I.C.J. Reports 1949*, p. 184.

Court of Justice".[295] This practice suggests that, whether a claim is addressed to the EU member States or the responsibility of the European Union is invoked, exhaustion of remedies existing within the European Union would be required.

(7) The need to exhaust local remedies with regard to claims against an international organization has been accepted, at least in principle, by the majority of writers.[296] Although the term "local remedies" may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2.

(8) As in article 44 on the responsibility of States for internationally wrongful acts, the requirement for local remedies to be exhausted is conditional on the existence of "any available and effective remedy". This requirement has been elaborated in greater detail by the Commission in articles 14 and 15 on diplomatic protection,[297] but for the purpose of the present draft articles the more concise description may prove adequate.

(9) While available and effective remedies within an international organization may exist only in the case of a limited number of organizations, paragraph 2, by referring to remedies "provided by that organization", intends to include also remedies that are available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims. The location of the remedies may affect their effectiveness in relation to the individual concerned.

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[295] "Oral statement and comments on the US response", 15 November 2000, A/CN.4/545, attachment No. 18.

[296] The applicability of the local remedies rule to claims addressed by States to international organizations was maintained by several authors: J.-P. Ritter, footnote 107 above, p. 427 at pp. 454–455; P. De Visscher, "Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de Droit International et de Droit Comparé*, vol. 40 (1963), p. 165 at p. 174; R. Simmonds, footnote 107 above, p. 238; B. Amrallah, footnote 107 above, p. 57 at p. 67; L. Gramlich, "Diplomatic Protection Against Acts of Intergovernmental Organs", *German Yearbook of International Law*, vol. 27 (1984), p. 386 at p. 398 (more tentatively); H.G. Schermers & N.M. Blokker, *International Institutional Law*, 3rd ed. (The Hague: Nijhoff, 1995), pp. 1167–1168; P. Klein, footnote 107 above, p. 534 ff.; C. Pitschas, footnote 107 above, p. 250; K. Wellens, *Remedies against International Organizations* (Cambridge: Cambridge University Press, 2002), pp. 66–67; G. Thallinger, "The Rule of Exhaustion of Local Remedies in the Context of the Responsibility of International Organizations", *Nordic Journal of International Law*, vol. 77 (2008), p. 401 ff. The same opinion was expressed by the Committee on Accountability of International Organisations of the ILA *Report of the Seventy-First Conference* (2004), p. 213. C. Eagleton, "International Organizations and the Law of Responsibility", *Recueil des Cours* ..., vol. 76 (1950-I), p. 323 at p. 395 considered that the local remedies rule would not be applicable to a claim against the United Nations, but only because "the United Nations does not have a judicial system or other means of 'local redress' such as are regularly maintained by states". A.A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", *Revue de Droit International et de Sciences Diplomatiques*, vol. 57 (1979), p. 81 at p. 108 noted that "when a claim for damages is lodged against an international organization, application of the rule is not excluded, but the law may still develop in different directions". The view that the local remedies rule should be applied in a flexible manner was expressed by M. Pérez González, footnote 107 above, p. 63 at p. 71. C.F. Amerasinghe, footnote 107 above, p. 486, considered that, since international organizations "do not have jurisdictional powers over individuals in general", it is "questionable whether they provide suitable internal remedies. Thus, it is difficult to see how the rule of local remedies would be applicable"; this view, which had already been expressed in the first edition of the same book, was shared by F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas* (Madrid: Dykinson, 2002), pp. 139–140.

[297] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 20.

(10) As in other provisions, the reference to "another" international organization in paragraph 2 is not intended to exclude that responsibility may be invoked against an international organization even when no other international organization is involved.

(11) Paragraph 2 is also relevant when, according to article 48, responsibility is invoked by a State or an international organization other than an injured State or international organization. A reference to article 44, paragraph 2, is made in article 48, paragraph 5, to this effect.

Article 46
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) The present article closely follows the text of article 45 on the responsibility of States for internationally wrongful acts,[298] with the replacement of "a State" by "an international organization" in the chapeau and the addition of "or international organization" in subparagraphs (a) and (b).

(2) It is clear that, for an injured State, the loss of the right to invoke responsibility can hardly depend on whether the responsible entity is a State or an international organization. In principle also an international organization should be considered to be in the position of waiving a claim or acquiescing in the lapse of the claim. However, it is to be noted that the special features of international organizations make it generally difficult to identify which organ is competent to waive a claim on behalf of the organization and to assess whether acquiescence on the part of the organization has taken place. Moreover, acquiescence on the part of an international organization may involve a longer period than the one normally sufficient for States.

(3) Subparagraphs (a) and (b) specify that a waiver or acquiescence entails the loss of the right to invoke responsibility only if it is "validly" made. As was stated in the commentary on article 20 of the present draft articles, this term "refers to matters 'addressed by international law rules outside the framework of State responsibility' or of the responsibility of an international organization, such as whether the organ or agent who gave the consent was authorized to do so on behalf of the relevant State or international organization, or whether the consent was vitiated by coercion or some other factor".[299] In the case of an international organization validity generally implies that the rules of the organization have to be respected. However, this requirement may encounter limits such as those stated in article 46, paragraphs 2 and 3, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[300] with regard to the relevance of respecting the rules of the organization relating to competence to conclude treaties in relation to the invalidity of the treaty for infringement of those rules.

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[298] *Yearbook ... 2001*, vol. II (Part Two), p. 121.

[299] Para. (5) of the commentary on article 20.

[300] A/CONF.129/15.

(4) When there is a plurality of injured States or injured international organizations, the waiver by one or more State or international organization does not affect the entitlement of the other injured States or organizations to invoke responsibility.

(5) Although subparagraphs (a) and (b) refer to "the injured State or international organization", a loss of the right to invoke responsibility because of a waiver or acquiescence may occur also for a State or an international organization that is entitled, in accordance with article 49, to invoke responsibility not as an injured State or international organization. This is made clear by the reference to article 46 contained in article 49, paragraph 5.

Article 47
Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Commentary

(1) This provision corresponds to article 46 on the responsibility of States for internationally wrongful acts.[301] The following cases, all relating to responsibility for a single wrongful act, are here considered: that there is a plurality of injured States; that there exists a plurality of injured international organizations; that there are one or more injured States and one or more injured international organizations.

(2) Any injured State or international organization is entitled to invoke responsibility independently from any other injured State or international organization. This does not preclude some or all of the injured entities invoking responsibility jointly, if they so wish. Coordination of claims would contribute to avoid the risk of a double recovery.

(3) An instance of claims that may be concurrently preferred by an injured State and an injured international organization was envisaged by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. The Court found that both the United Nations and the national State of the victim could claim "in respect of the damage caused […] to the victim or to persons entitled through him" and noted that there was "no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense […]".[302]

(4) An injured State or international organization could undertake to refrain from invoking responsibility, leaving other injured States or international organizations to do so. If this undertaking is not only an internal matter between the injured entities, it could lead to the loss for the former State or international organization of the right to invoke responsibility according to article 46.

(5) When an international organization and one or more of its members are both injured as the result of the same wrongful act, the rules of the organization could similarly attribute to the organization or to its members the exclusive function of invoking responsibility.

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[301] *Yearbook ... 2001*, vol. II (Part Two), p. 123.

[302] *I.C.J. Reports 1949*, pp. 184–186.

Article 48
Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Commentary

(1) The present article addresses the case where an international organization is responsible for a given wrongful act together with one or more other entities, either international organizations or States. The joint responsibility of an international organization with one or more States is envisaged in articles 14 to 18, which concern the responsibility of an international organization in connection with the act of a State, and in articles 58 to 62, which deal with the responsibility of a State in connection with the internationally wrongful act of an international organization. Another example is provided by so-called mixed agreements that are concluded by the European Union together with its member States, when such agreements do not provide for the apportionment of the responsibility between the Union and its member States. As was stated by the European Court of Justice in a case *Parliament v. Council* relating to a mixed cooperation agreement: "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[303]

(2) Like article 47 on the responsibility of States for internationally wrongful acts,[304] paragraph 1 provides that the responsibility of each responsible entity may be invoked by the injured State or international organization. However, there may be cases in which a State or an international organization bears only subsidiary responsibility, to the effect that it would have an obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organization fails to do so. Article 62 gives an example of subsidiary responsibility, by providing that, when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is "presumed to be subsidiary".

(3) An injured State or international organization may address a claim to a subsidiarily responsible entity before the primarily responsible organization fails to provide reparation

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[303] Judgment of 2 March 1994, case C-316/91, *European Court of Justice Reports*, 1994, p. I-623 at pp. I-660–661, recital 29.

[304] *Yearbook ... 2001*, vol. II (Part Two), p. 124.

only if the claim is subject to the condition that the entity whose responsibility is primary fails to provide reparation.

(4) Paragraph 3 corresponds to article 47, paragraph 2, on the responsibility of States for internationally wrongful acts, with the addition of the words "or international organization" in subparagraphs (a) and (b). A slight change in the wording of subparagraph (b) is intended to make it clearer that the right of recourse accrues to the State or international organization "providing reparation".

Article 49
Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Commentary

(1) The present article corresponds to article 48 on the responsibility of States for internationally wrongful acts.[305] It concerns the invocation of responsibility of an international organization by a State or another international organization which, although it is owed the obligation breached, cannot be regarded as injured within the meaning of article 43 of the present draft articles. According to paragraph 4, when that State or the latter international organization is entitled to invoke responsibility, it may claim cessation

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[305] *Ibid.*, p. 126.

of the internationally wrongful act, assurances and guarantees of non-repetition and the performance of the obligation of reparation "in the interest of the injured State or international organization or of the beneficiaries of the obligation breached".

(2) Paragraph 1 concerns the first category of cases in which this limited entitlement arises. The category comprises cases when the "obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group". Apart from the addition of the words "or international organizations" and "or organization", this text reproduces subparagraph (a) of article 48, paragraph 1, on the responsibility of States for internationally wrongful acts.

(3) The reference in paragraph 1 to the "collective interest of the group" is intended to specify that the obligation breached is not only owed, under the specific circumstances in which the breach occurs, to one or more members of the group individually. For instance, should an international organization breach an obligation under a multilateral treaty for the protection of the common environment, the other parties to the treaty may invoke responsibility because they are affected by the breach, even if they are not "specially affected" within the meaning of article 43, subparagraph (b), (i). Each member of the group would then be entitled to request compliance as a guardian of the collective interest of the group.

(4) Obligations that an international organization may have towards its members under its rules do not necessarily fall within this category. Moreover, the rules of the organization may restrict the entitlement of a member to invoke responsibility of that organization.

(5) The wording of paragraph 1 does not imply that the obligation breached should necessarily be owed to a group comprising States and international organizations. That obligation may also be owed to either a group of States or a group of international organizations. As in other provisions, the reference to "another international organization" in the same paragraph does not imply that more than one international organization needs to be involved.

(6) Paragraphs 2 and 3 consider the other category of cases when a State or an international organization that is not injured within the meaning of article 43 may nevertheless invoke responsibility, although to the limited extent provided in paragraph 4. Paragraph 2, which refers to the invocation of responsibility by a State, is identical to article 48, paragraph 1, subparagraph (b) on the responsibility of States for internationally wrongful acts. It seems clear that, should a State be regarded as entitled to invoke the responsibility of another State which has breached an obligation towards the international community as a whole, the same applies with regard to the responsibility of an international organization that has committed a similar breach. As was observed by the Organization for the Prohibition of Chemical Weapons, "there does not appear to be any reason why States — as distinct from other international organizations — may not also be able to invoke the responsibility of an international organization".[306]

(7) An international organization, when invoking the responsibility of another international organization in the case of breach of an international obligation towards the international community as a whole, would act only in the exercise of functions that have been attributed to it by its member States, which would be entitled to invoke responsibility individually or jointly in relation to a breach.

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[306] A/CN.4/593, sect. II.F.1.

(8) Legal writings concerning the entitlement of international organizations to invoke responsibility in case of a breach of an obligation owed to the international community as a whole mainly focus on the European Union. The views are divided among authors, but a clear majority favours an affirmative solution.[307] Although authors generally consider only the invocation by an international organization of the international responsibility of a State, a similar solution would seem to apply to the case of a breach by another international organization.

(9) Practice in this regard is not very indicative. This is not just because practice relates to action taken by international organizations in respect of States. When international organizations respond to breaches committed by their members they often act only on the basis of their respective rules. It would be difficult to infer from this practice the existence of a general entitlement of international organizations to invoke responsibility. The most significant practice appears to be that of the European Union, which has often stated that non-members committed breaches of obligations which appear to be owed to the international community as a whole. For instance, a common position of the Council of the European Union of 26 April 2000 referred to "severe and systematic violations of human rights in Burma".[308] A more recent example are the measures taken by the Council of the European Union with regard to the situation in Libya; the EU "strongly condemned the violence and use of force against civilians and deplored the repression against peaceful demonstrators".[309] It is not altogether clear whether responsibility was jointly invoked by the member States of the European Union or by the European Union as a distinct organization. In most cases this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. Those measures will be discussed in the next chapter.

(10) Paragraph 3 restricts the entitlement of an international organization to invoke responsibility in case of a breach of an international obligation owed to the international community as a whole. It is required that "safeguarding the interest of the international community underlying the obligation breached be included among the functions of the international organization invoking responsibility". Those functions reflect the character and purposes of the organization. The rules of the organization would determine which are

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[307] The opinion that at least certain international organizations could invoke responsibility in case of a breach of an obligation *erga omnes* was expressed by C.-D. Ehlermann, "Communautés européennes et sanctions internationales – une réponse à J. Verhoeven", *Revue Belge de Droit International*, vol. 18 (1984–5), p. 96 at pp. 104–105; E. Klein, "Sanctions by International Organizations and Economic Communities", *Archiv des Völkerrechts*, vol. 30 (1992), p. 101 at p. 110; A. Davì, *Comunità europee e sanzioni economiche internazionali* (Napoli: Jovene, 1993), p. 496 ff.; C. Tomuschat, "Artikel 210", in: H. van der Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th ed. (Baden-Baden: Nomos, 1997), vol. 5, pp. 28–29; P. Klein, footnote 107 above, p. 401 ff.; A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las organizaciones internacionales* (Valencia: Tirant, 2006), p. 166. The opposite view was maintained by J. Verhoeven, "Communautés européennes et sanctions internationales", *Revue Belge de Droit International*, vol. 18 (1984–5), p. 79 at pp. 89–90, and P. Sturma, "La participation de la Communauté internationale à des 'sanctions' internationales", *Revue du Marché Commun et de l'Union européenne*, No. 366 (1993), p. 250 at p. 258. According to P. Palchetti, "Reactions by the European Union to Breaches of Erga Omnes Obligations", in: E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 219 at p. 226, "the role of the Community appears to be only that of implementing rights that are owed to its Member States".

[308] *Official Journal of the European Communities*, 14 May 2000, *L* 122, p. 1.

[309] Council Decision 2011/137/CFSP of 28 February 2011, *Official Journal of the European Union*, 3 March 2011, *L* 58, p. 53.

the functions of the international organization. There is no requirement of a specific mandate of safeguarding the interest of the international community under those rules.

(11) The solution adopted in paragraph 3 corresponds to the view expressed by several States[310] in the Sixth Committee of the General Assembly, in response to a question raised by the Commission in its 2007 report to the General Assembly.[311] A similar view was shared by some international organizations that contributed comments on this question.[312]

(12) It is noteworthy that in its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* the Seabed Chamber of the International Tribunal on the Law of the Sea considered that the entitlement of the Seabed Authority to claim compensation for breaches of obligations in the Area "is implicit in article 137, paragraph 2, of the [United Nations] Convention [on the Law of the Sea], which states that the Authority shall act 'on behalf' of mankind".[313] Although this conclusion was based on a specific provision of the Convention, it essentially rested — as article 49, paragraph 2 — on the functions entrusted to the relevant international organization.

(13) Paragraph 5 is based on article 48, paragraph 3, on the responsibility of States for internationally wrongful acts. It is designed to indicate that the provisions concerning notice of claim, admissibility of claims and loss of the right to invoke responsibility apply also with regard to States and international organizations that invoke responsibility according to the present article. While article 48, paragraph 3, on the responsibility of States for internationally wrongful acts makes a general reference to the corresponding provisions (arts. 43 to 45), it is not intended to extend the applicability of "any applicable rule relating to the nationality of claims", which is stated in article 44, subparagraph (a), because that requirement is clearly not relevant to the obligations dealt with in article 48. Although this may be taken as implied, the reference in paragraph 5 of the present article has been expressly limited to the paragraph on admissibility of claims that relates to the exhaustion of local remedies.

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[310] Thus the interventions of Argentina (A/C.6/62/SR.18, para. 64), Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 100), Italy (A/C.6/62/SR.19, para. 40), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 39), the Russian Federation (A/C.6/62/SR.21, para. 70) and Switzerland (A/C.6/62/SR.21, para. 85). See also the intervention of the Czech Republic (A/C.6/64/SR.15, para. 58) and the written comment of Germany (A/CN.4/636, sect. II.B.23). Other States appear to favour a more general entitlement for international organizations. See the interventions of Belarus (A/C.6/62/SR.21, para. 97), Belgium (A/C.6/62/SR.21, para. 90), Cyprus (A/C.6/62/SR.21, para. 38), Hungary (A/C.6/62/SR.21, para. 16) and Malaysia (A/C.6/62/SR.19, para. 75).

[311] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30. The question ran as follows: "Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?"

[312] See the views expressed by the Organization for the Prohibition of Chemical Weapons (A/CN.4/593, sect. II.F.1), the Commission of the European Union (*ibid.*), the World Health Organization (*ibid.*) and the International Organization for Migration (A/CN.4/593/Add.1, sect. II.B). See also the reply of the World Trade Organization (A/CN.4/593, sect. II.F.1).

[313] Advisory opinion of 1 February 2011, para. 180, available at: www.itlos.org.

Article 50
Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Commentary

(1) Articles 43 to 49 above address the implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 33, which defines the scope of the international obligations set out in Part Three by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole. The same article further specifies that this is "without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization". Thus, by referring only to the invocation of responsibility by a State or an international organization the scope of the present Chapter reflects that of Part Three. Invocation of responsibility is considered only insofar as it concerns the obligations set out in Part Three.

(2) While it could be taken as implied that the articles concerning invocation of responsibility are without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke responsibility of an international organization, an express statement to this effect serves the purpose of conveying more clearly that the present Chapter is not intended to exclude any such entitlement.

Chapter II
Countermeasures

Article 51
Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Commentary

(1) As set forth in article 22, when an international organization incurs international responsibility, it could become the object of countermeasures. An injured State or international organization could then take countermeasures, since there is no convincing reason for categorically exempting responsible international organizations from being

possible targets of countermeasures. In principle, the legal situation of a responsible international organization in this regard appears to be similar to that of a responsible State.

(2) This point was made also in the comments of certain international organizations. The World Health Organization agreed that "there is no cogent reason why an international organization that breaches an international obligation should be exempted from countermeasures taken by an injured State or international organization to bring about compliance by the former organization with its obligations".[314] Also UNESCO stated that it "[did] not have any objection to the inclusion of draft articles on countermeasures" in a text on the responsibility of international organizations.[315] The OSCE accepted "the possibility of countermeasures by and against international organizations".[316]

(3) In response to a question raised by the Commission, several States expressed the view that rules generally similar to those that were devised for countermeasures taken against States in articles 49 to 53 of the articles on the responsibility of States for internationally wrongful acts should be applied to countermeasures directed against international organizations.[317]

(4) Practice concerning countermeasures taken against international organizations is undoubtedly scarce. However, one may find some examples of measures that were defined as countermeasures. For instance, in *United States – Import Measures on Certain Products from the European Communities*, a WTO panel considered that the suspension of concessions or other obligations which had been authorized by the Dispute Settlement Body against the European Communities was "essentially retaliatory in nature". The panel observed:

> "Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on State responsibility (proportionality, etc. ... see article 43 of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU."[318]

(5) Paragraphs 1 to 3 define the object and limits of countermeasures in the same way as has been done in the corresponding paragraphs of article 49 on the responsibility of States for internationally wrongful acts.[319] There is no apparent justification for a distinction in this regard between countermeasures taken against international organizations and countermeasures directed against States.

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[314] A/CN.4/609, sect. II.I.

[315] A/CN.4/609, sect. II.I.

[316] A/CN.4/637, sect. II.B.21.

[317] See the interventions by Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 101), Malaysia (A/C.6/62/SR.19, para. 75, also envisaging some "additional restrictions"), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 40), Switzerland (A/C.6/62/SR.21, para. 86) and Belgium (A/C.6/62/SR.21, para. 91). These interventions were made in response to a request for comments made by the Commission, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30 (b).

[318] WT/DS165/R, 17 July 2000, para. 6.23, note 100. The reference made by the panel to the work of the Commission concerns the first-reading articles on State responsibility. The question whether measures taken within the WTO system may be qualified as countermeasures is controversial. For the affirmative view see H. Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale* (Paris: L.G.D.J., 2007), pp. 454–461.

[319] *Yearbook ... 2001*, vol. II (Part Two), p. 129.

(6) One matter of concern that arises with regard to countermeasures affecting international organizations is the fact that countermeasures may hamper the functioning of the responsible international organization and therefore endanger the attainment of the objectives for which that organization was established. While this concern could not justify the total exclusion of countermeasures against international organizations, it may lead to asserting some restrictions. Paragraph 4 addresses the question in general terms. Further restrictions, that specifically pertain to the relations between an international organization and its members, are considered in the following article.

(7) The exercise of certain functions by an international organization may be of vital interest to its member States and in certain cases to the international community. However, it would be difficult to define restrictions to countermeasures on the basis of this criterion, because the distinction would not always be easy to make and moreover the fact of impairing a certain function may have an impact on the exercise of other functions. Thus, paragraph 4 requires an injured State or international organization to select countermeasures that would affect, in as limited a manner as possible, the exercise by the targeted international organization of any of its functions. A qualitative assessment of the functions that would be likely to be affected may nevertheless be taken as implied.

Article 52
Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in article 51 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Commentary

(1) The adoption of countermeasures against an international organization by its members may be precluded by the rules of the organization. The same rules may on the contrary allow countermeasures, but only on certain conditions that may differ from those applying under general international law. Those conditions are likely to be more restrictive. As was noted by the World Health Organization, "for international organizations of quasi-universal membership such as those of the United Nations system, the possibility for their respective Member States to take countermeasures against them would either be severely limited by the operation of the rules of those organizations, rendering it largely virtual, or would be subject to a *lex specialis* — thus outside the scope of the draft articles — to the

extent that the rules of the organization concerned do not prevent the adoption of countermeasures by its Member States".[320]

(2) In one of its comments UNESCO, "considering that often countermeasures are not specifically provided for by the rules of international organizations, [supported] the possibility for an injured member of an international organization to resort to countermeasures which are not explicitly allowed by the rules of the organization".[321] However, as UNESCO also noted, some specific restrictions are called for.[322] These restrictions would be consonant with the principle of cooperation underlying the relations between an international organization and its members.[323]

(3) The restrictions in question are meant to be additional to those that are generally applicable to countermeasures that are taken against an international organization. It is probably not necessary to state expressly that the restrictions set forth in the present article are additional to those that appear in the other articles included in the Chapter.

(4) The present article makes a distinction between countermeasures by injured member States or international organizations against the organization of which they are members in general, and those that are taken in response to a breach by that organization of an international obligation arising under the rules of the organization. Paragraph 1 sets forth the residual rule while paragraph 2 addresses the latter case.

(5) Paragraph 2 requires countermeasures not to be inconsistent with the rules of the organization. This implies that the taking of countermeasures need not be based on the rules of the organization, but should not run counter any restriction provided for in these rules.

(6) Paragraph 2 further provides that countermeasures may not be resorted to when some "appropriate means" for inducing compliance are available. The term "appropriate means" refers to those lawful means that are proportionate and offer a reasonable prospect for inducing compliance when the member intends to take countermeasures. However, failure on the part of the member to make timely use of remedies that were available could result in countermeasures becoming precluded.

(7) An example of the relevance of appropriate means existing in accordance with the rules of the organization is offered by a judgment of the Court of Justice of the European Communities. Two member States had argued that, although they had breached an obligation under the constituent instrument, their infringement was excused by the fact that the Council of the European Economic Community (EEC) had previously failed to comply with one of its obligations. The Court of Justice said:

> "[...] except where otherwise expressly provided, the basic concept of the [EEC] Treaty requires that the member States shall not take the law into their own hands.

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[320] A/CN.4/609, sect. II.I.

[321] A/CN.4/609, sect. II.I.

[322] *Ibid.* UNESCO expressed its agreement with the terms "only if this is not inconsistent with the rules of the injured organization" which had been proposed by the special rapporteur in his sixth report (A/CN.4/597, para. 48).

[323] This principle was expressed by the International Court of Justice in its advisory opinion on the Interpretation of the Agreement as follows:

> "The very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization."
>
> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 93, para. 43.

> Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs."[324]

The existence of judicial remedies within the European Communities appears to be the basic reason for this statement.

(8) Paragraph 2 considers the taking of countermeasures by injured States or international organizations against the organization of which they are members when the latter has breached an international obligation arising under the rules of the organization. In this case, in view of the special ties existing between an international organization and its members,[325] countermeasures are allowed only if they are provided for by these rules.

(9) As has been stated in article 22, paragraphs 2 and 3, restrictions similar to the ones here envisaged apply in the reverse case of an international organization intending to take countermeasures against one of its members.

Article 53
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Commentary

(1) With the exception of the last subparagraph, the present article reproduces the list of obligations not affected by countermeasures that is contained in article 50 on the responsibility of States for internationally wrongful acts.[326] Most of these obligations are obligations that the injured State or international organization has towards the international community. With regard to countermeasures taken against an international organization, the breaches of these obligations are relevant only insofar as the obligation in question is also owed to the international organization concerned, since the existence of an obligation towards the targeted entity is a condition for a measure to be defined a countermeasure. Thus, the use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization. This occurs if

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[324] Judgment of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, joined cases 90/63 and 91/63, *European Court of Justice Reports*, 1964, p. 1201 (French edition).

[325] The same reason is given in para. (6) of the commentary on article 22.

[326] *Yearbook ... 2001*, vol. II (Part Two), p. 131.

the organization is considered to be a component of the international community to which the obligation is owed or if the obligation breached is owed to the organization because of special circumstances, for instance because force is used in relation to a territory that the organization administers.

(2) Article 50, paragraph 2 (b) on the responsibility of States for internationally wrongful acts provides that obligations concerning the "inviolability of diplomatic or consular agents, premises, archives and documents" are not affected by countermeasures. Since those obligations cannot be owed to an international organization, this case is clearly inapplicable to international organizations and has not been included in the present article. However, the rationale underlying that restriction, namely the need to protect certain persons and property that could otherwise become an easy target of countermeasures,[327] also applies to international organizations and their agents. Thus a restriction concerning obligations that protect international organizations and their agents has been set forth in paragraph 2 (b). The content of obligations concerning the inviolability of the agents and of the premises, archives and documents of international organizations may vary considerably according to the applicable rules. Therefore the subparagraph refers to "any" inviolability. The term "agent" is wide enough to include any mission that an international organization would send, permanently or temporarily, to a State or another international organization.

(3) While article 50, paragraph 1(b) on the responsibility of States for internationally wrongful acts refers to "fundamental human rights", the corresponding text of the present article does not quality the term "human rights". This omission conforms to the tendency not to make a distinction among human rights according to their relative importance.

Article 54
Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) The text of the present article is identical to article 51 on the responsibility of States for internationally wrongful acts.[328] It reproduces, with a few additional words, the requirement stated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[329]

(2) As was stated by the Commission in its commentary on article 51, proportionality "is concerned with the relationship between the internationally wrongful act and the countermeasure"; "a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance".[330] The commentary further explained that "the reference to 'the rights in question' has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State".[331] In the present context this reference would apply to the effects on the injured State or international organization and to the rights of the responsible international organization.

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[327] *Ibid.*, p. 134, para. (15).

[328] *Ibid.*, p. 134.

[329] *I.C.J. Reports 1997*, p. 56, para. 85.

[330] *Yearbook ... 2001*, vol. II (Part Two), p. 135, para. (7).

[331] *Ibid.*, para. (6).

(3) One aspect that is relevant when assessing proportionality of a countermeasure is the impact that it may have on the targeted entity. One and the same countermeasure may affect a State or an international organization in a different way according to the circumstances. For instance, an economic measure that might hardly affect a large international organization may severely hamper the functioning of a smaller organization and for that reason not meet the test of proportionality.

(4) When an international organization is injured, it is only the organization and not its members that is entitled to take countermeasures. Should the international organization and its members both be injured, as in other cases of a plurality of injured entities, both would be entitled to resort to countermeasures. In this case, however, there would be the risk of a reaction that is excessive in terms of proportionality.[332]

Article 55
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Procedural conditions relating to countermeasures have been developed mainly in relations between States. Those conditions are not however related to the nature of the targeted entity. Thus the rules that are set forth in article 52 on the responsibility of States for internationally wrongful acts[333] appear to be equally applicable when the responsible entity is an international organization. The conditions stated in article 52 have been reproduced in the present article with minor adaptations.

(2) Paragraph 1 sets forth the requirement that the injured State or international organization call on the responsible international organization to fulfil its obligations of cessation and reparation, and notify the intention to take countermeasures, while offering to engage in negotiations. The responsible international organization is thus given an opportunity to appraise the claim made by the injured State or international organization

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[332] Belgium (A/C.6/62/SR.21, para. 92) referred to the need of preventing "countermeasures adopted by an international organization from exerting an excessively destructive impact".

[333] *Yearbook ... 2001*, vol. II (Part Two), p. 135.

and become aware of the risk of being the target of countermeasures. By allowing urgent countermeasures, paragraph 2 makes it however possible for the injured State or international organization to apply immediately those measures that are necessary to preserve its rights, in particular those that would lose their potential impact if delayed.

(3) Paragraphs 3 and 4 concern the relations between countermeasures and the applicable procedures for the settlement of disputes. The idea underlying these two paragraphs is that, when the parties to a dispute concerning international responsibility have agreed to entrust the settlement of the dispute to a body which has the authority to make binding decisions, the task of inducing the responsible international organization to comply with its obligations under Part Three will rest with that body. These paragraphs are likely to be of limited importance in practice in relations with a responsible international organization, in view of the reluctance of most international organizations to accept methods for the compulsory settlement of disputes.[334]

Article 56
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Commentary

(1) The content of this article follows from the definition of the object of countermeasures in article 51. Since the object of countermeasures is to induce an international organization to comply with its obligations under Part Three with regard to an internationally wrongful act for which that organization is responsible, countermeasures are no longer justified and have to be terminated once the responsible organization has complied with those obligations.

(2) The wording of this article closely follows that of article 53 on the responsibility of States for internationally wrongful acts.[335]

Article 57
Measures taken by States or international organizations other than an injured State or international organization

This chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of an international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

Commentary

(1) Countermeasures taken by States or international organizations which are not injured within the meaning of article 43, but are entitled to invoke responsibility of an international organization according to article 49 of the present draft articles, could have as an object

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[334] Even if mechanisms for the compulsory settlement of disputes are considered to include those involving the request for an advisory opinion of the International Court of Justice which the parties agree to be "decisive", as in the Convention on the Privileges and Immunities of the United Nations (sect. 22 of article VI).

[335] *Yearbook ... 2001*, vol. II (Part Two), p. 137.

only cessation of the breach and reparation in the interest of the injured State or international organization or of the beneficiaries of the obligation breached. Restrictions provided for in articles 51 to 56 would in any event apply, but the question may be asked whether States or international organizations which are not injured within the meaning of article 43 may resort to countermeasures at all.

(2) Article 54 on the responsibility of States for internationally wrongful acts[336] leaves "without prejudice" the question whether a non-injured State that is entitled to invoke responsibility of another State would have the right to resort to countermeasures. The basic argument given by the Commission in its commentary on article 54 was that State practice relating to countermeasures taken in the collective or general interest was "sparse" and involved "a limited number of States".[337] No doubt, this argument would be even stronger when considering the question whether a non-injured State or international organization may take countermeasures against a responsible international organization. In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.[338] It seems therefore preferable to leave equally "without prejudice" the question whether countermeasures by a non-injured State or international organization are allowed against a responsible international organization.

Part Five
Responsibility of a State in connection with the conduct of an international organization

Commentary

(1) In accordance with article 1, paragraph 2, the present draft articles are intended to fill a gap that was deliberately left in the articles on the responsibility of States for internationally wrongful acts. As stated in article 57 on the responsibility of States for internationally wrongful acts, those articles are "without prejudice to any question of the responsibility [...] of any State for the conduct of an international organization".[339]

(2) Not all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to attribution of conduct to a State are covered only in the articles on the responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether certain conduct is to be attributed to a State or to an international organization or to both, the present articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the articles on the responsibility of States for internationally wrongful acts will regulate attribution of conduct to the State.

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[336] *Ibid.*, p. 137.

[337] *Ibid.*, p. 139, para. 6.

[338] It is to be noted that practice includes examples of a non-injured international organization taking countermeasures against an allegedly responsible State. See, for instance, the measures taken by the Council of the European Union against Burma/Myanmar in view of "severe and systematic violations of human rights in Burma". *Official Journal of the European Communities*, 14 May 2000, *L* 122, pp. 1 and 29.

[339] *Yearbook ... 2001*, vol. II (Part Two), p. 141.

(3) The present Part assumes that there exists conduct attributable to an international organization. In most cases, that conduct will also be internationally wrongful. However, exceptions are provided for the cases envisaged in articles 60 and 61, which deal respectively with coercion of an international organization by a State and with international responsibility in case of a member State circumventing one of its international obligations by taking advantage of the competence of an international organization.

(4) According to articles 61 and 62, the State that incurs responsibility in connection with the act of an international organization is necessarily a member of that organization. In the cases envisaged in articles 58, 59 and 60, the responsible State may or may not be a member.

(5) The present Part does not address the question of responsibility that may arise for entities other than States that are also members of an international organization. Chapter IV of Part Two of the present draft articles already considers the responsibility that an international organization may incur when it aids or assists or directs and controls in the commission of an internationally wrongful act of another international organization of which the former organization is a member. The same chapter also deals with coercion by an international organization that is a member of the coerced organization. Article 18 considers further cases of responsibility of international organizations as members of another international organization. Questions relating to the responsibility of entities, other than States or international organizations, that are also members of international organizations fall outside the scope of the present draft articles.

Article 58
Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Commentary

(1) The present article addresses a situation parallel to the one covered in article 14, which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization. Both articles closely follow the text of article 16 on the responsibility of States for internationally wrongful acts.[340]

(2) Aid or assistance by a State could constitute a breach of an obligation that the State has acquired under a primary norm. For example, a nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons[341] would have to refrain from assisting a non-nuclear-weapon State in the acquisition of nuclear weapons, and the same would

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[340] *Ibid.*, p. 65.

[341] United Nations, *Treaty Series*, vol. 729, p. 161.

seem to apply to assistance given to an international organization of which some non-nuclear-weapon States are members.

(3) The present article uses the same wording as article 16 on the responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State. Paragraph 1 sets under (a) and (b) the conditions for international responsibility to arise for the aiding or assisting State. It is to be noted that no distinction is made with regard to the temporal relation between the conduct of the State and the internationally wrongful act of the international organization.

(4) A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. Should the State be a member, the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded. However, as specified in paragraph 2, an act by a member State which is done in accordance with the rules of the organization does not as such engage the international responsibility of that State for aid or assistance. These criteria could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.

(5) The fact that a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article, but rather under the articles on the responsibility of States for internationally wrongful acts.

(6) The heading of article 16 on the responsibility of States for internationally wrongful acts has been slightly adapted, by adding "by a State" to the words "aid or assistance", in order to distinguish the heading of the present article from that of article 14 of the present draft articles.

Article 59
Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Commentary

(1) While article 15 relates to direction and control exercised by an international organization in the commission of an internationally wrongful act by another international organization, the present article considers the case in which direction and control are

exercised by a State. Both articles closely follow the text of article 17 on the responsibility of States for internationally wrongful acts.[342]

(2) The State directing and controlling an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. As in the case of aid or assistance, which is considered in article 58 and the related commentary, a distinction has to be made between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been referred to in the commentary on the previous article.

(3) Paragraph 1 sets under (a) and (b) the conditions for the responsibility of the State to arise with the same wording that is used in article 17 on the responsibility of States for internationally wrongful acts. There are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.

(4) As in article 58, paragraph 2 specifies that an act of a member State done in accordance with the rules of the organization does not as such cause the responsibility of that State for direction and control in the commission of an internationally wrongful act.

(5) The heading of the present article has been slightly adapted from article 17 on the responsibility of States for internationally wrongful acts by adding the words "by a State", in order to distinguish it from the heading of article 15 of the present articles.

Article 60
Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) Article 16 deals with coercion by an international organization in the commission of what would be, but for the coercion, a wrongful act of another international organization. The present article concerns coercion by a State in a similar situation. Both articles closely follow article 18 on the responsibility of States for internationally wrongful acts.[343] The existence of a direct link between the act of coercion and the act of the coerced State or international organization is in any event assumed.

(2) The conditions that the present article sets forth for international responsibility to arise are identical to those that are listed in article 18 on the responsibility of States for internationally wrongful acts. Also with regard to coercion, there is no reason to provide a different rule from that which applies in the relations between States.

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[342] *Yearbook ... 2001*, vol. II (Part Two), pp. 67–68.

[343] *Ibid.*, p. 69.

(3) The State coercing an international organization may be a member of that organization. The present article does not contain a paragraph similar to paragraph 2 of articles 58 and 59 because it seems highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization. However, one cannot assume that the act of coercion will necessarily be unlawful.

(4) The heading of the present article slightly adapts that of article 18 on the responsibility of States for internationally wrongful acts by introducing the words "by a State": this in order to distinguish it from the heading of article 16 of the present draft.

Article 61

Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Commentary

(1) The present article concerns a situation which is to a certain extent analogous to those considered in article 17. According to that article, an international organization incurs international responsibility when it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization. Article 17 also covers circumvention through authorizations given to member States or international organizations. The present article concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

(2) As the commentary on article 17 explains, the existence of an intention to avoid compliance is implied in the use of the term "circumvention".[344] International responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State's conduct. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights.[345]

(3) The jurisprudence of the European Court of Human Rights provides a few examples of *dicta* affirming the possibility of States being held responsible when they fail to ensure compliance with their obligations under the European Convention of Human Rights in a field where they have attributed competence to an international organization. In *Waite and*

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[344] Para. (4) of the commentary on article 17 above.

[345] In article 5 (b) of a resolution adopted in 1995 at Lisbon on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", the Institute of International Law stated: "In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as […] the abuse of rights." *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

Kennedy v. Germany the Court examined the question whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency, of which it was a member, in relation to claims concerning employment. The Court said that:

> "Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[346]

(4) In *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland* the Court took a similar approach with regard to a State measure implementing a regulation of the European Community. The Court said that a State could not free itself from its obligations under the European Convention of Human Rights by transferring functions to an international organization, because:

> "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards [...]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...]."[347]

(5) In a more recent case before the European Court of Human Rights, *Gasparini v. Italy and Belgium*, an application had been made against these two States by two employees of NATO alleging the inadequacy of the settlement procedure concerning employment disputes with NATO. The Court said that States, when they transfer part of their sovereign powers to an organization of which they are members, are under an obligation to see that the rights guaranteed by the Convention receive within the organization an "equivalent protection" to that ensured by the Convention mechanism. As in the two previous decisions

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[346] Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 410, para. 67. The Court concluded that the "essence of the applicant's 'right to a court'" under the Convention had not been impaired (p. 412, para. 73). After examining the dictum in *Waite and Kennedy v. Germany* reproduced above, I. Brownlie, "The Responsibility of States for the Acts of International Organizations", in: M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355 at p. 361, noted that, "whilst the context is that of human rights, the principle invoked would seem to be general in its application". Views similar to those of the European Court of Human Rights were expressed by A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di Diritto Internazionale*, vol. 57 (1974), p. 270 at pp. 275–276; M. Hirsch, footnote 107 above, p. 179; K. Zemanek, in *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 329; P. Sands, in: P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 524; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), p. 64; O. De Schutter, "Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility", in: J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp/Oxford/Portland: Intersentia, 2010), p. 51.

[347] Judgment of 30 June 2005, *ECHR Reports*, 2005-VI, pp. 157–158, para. 154. The Court found that the defendant State had not incurred responsibility because the relevant fundamental rights were protected within the European Community "in a manner which can be considered at least equivalent to that for which the Convention provides", p. 158, para. 155.

referred to in the preceding paragraphs, the Court found that this obligation had not been breached, in this case because the procedure within NATO was not tainted with "manifest insufficiency".[348]

(6) According to the present article, three conditions are required for international responsibility to arise for a member State circumventing one of its international obligations. The first one is that the international organization has competence in relation to the subject matter of an international obligation of a State. This could occur through the transfer of State functions to an organization of integration. However, the cases covered are not so limited. Moreover, an international organization could be established in order to exercise functions that States may not have. What is relevant for international responsibility to arise under the present article, is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.

(7) A second condition for international responsibility to arise according to the present article is that there be a significant link between the conduct of the circumventing member State and that of the international organization. The act of the international organization has to be caused by the member State.

(8) The third condition for international responsibility to arise is that the international organization commits an act that, if committed by the State, would have constituted a breach of the obligation. An act that would constitute a breach of the obligation has to be committed.

(9) Paragraph 2 explains that the present article does not require the act to be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the mere existence of an international obligation for the organization does not necessarily exempt the State from international responsibility.

(10) Should the act of the international organization be wrongful and be caused by the member State, there could be an overlap between the cases covered in article 61 and those considered in articles 58, 59 and 60. This would occur when the conditions set by one of these articles are fulfilled. However, such an overlap would not be problematic, because it would only imply the existence of a plurality of bases for holding the State responsible.

Article 62
Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or

(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

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[348] European Court of Human Rights, application No. 10750/03, decision of 12 May 2009. Issued in French; text available at www.rtdh.eu/pdf/20090512_gasparini_c_italie.pdf.

Commentary

(1) A State member of an international organization may be held responsible in accordance with articles 58 to 61. The present article envisages two additional cases in which member States incur responsibility. Member States may furthermore be responsible according to the articles on the responsibility of States for internationally wrongful acts,[149] but this lies beyond the scope of the present draft articles.

(2) Consistently with the approach generally taken by the present draft articles as well as by the articles on the responsibility of States for internationally wrongful acts, article 62 positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. While it would be thus inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which responsibility is not considered to arise for a State in connection with the act of an international organization, such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.

(3) The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases. The German Government recalled in a written comment that it had:

> "advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and the International Court of Justice (*Legality of Use of Force*) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO and the United Nations".[150]

(4) A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council (ITC), albeit incidentally in disputes concerning private contracts. The clearest expressions were given by Lord Kerr in the Court of Appeal and by Lord Templeman in the House of Lords. Lord Kerr said that he could not:

> "find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable — let alone jointly and severally — in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name."[151]

With regard to an alleged rule of international law imposing on "States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members", Lord Templeman found that:

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[149] This would apply to the case envisaged by the Institute of International Law in article 5 (c) (ii) of its resolution on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties": the case that "the international organization has acted as the agent of the State, in law or in fact". *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

[150] A/CN.4/556, sect. O.

[151] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, ILR, vol. 80, p. 109.

> "No plausible evidence was produced of the existence of such a rule of international law before or at the time of ITA6 [the Sixth International Tin Agreement] in 1982 or afterwards."[352]

(5) Although writers are divided on the question of responsibility of States when an international organization of which they are members commits an internationally wrongful act, it is noteworthy that the Institute of International Law adopted in 1995 a resolution in which it took the position that:

> "Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[353]

(6) The view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous articles, in which a State would be responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned. This case is stated in subparagraph (a). No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.

(7) In his judgment in the Court of Appeal concerning the International Tin Council, Lord Ralph Gibson referred to acceptance of responsibility in the "constituent document".[354] One can certainly envisage that acceptance results from the constituent instrument of the international organization or from other rules of the organization. However, member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party.[355] It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.[356] Thus, paragraph 1 (a) specifies that acceptance of responsibility only operates if it is made "towards the injured party".

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[352] Judgment of 26 October 1989, *Australia & New Zealand Banking Group Ltd. and Others v. Commonwealth of Australia and 23 Others*; *Amalgamated Metal Trading Ltd. and Others v. Department of Trade and Industry and Others*; *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*; *Maclaine Watson & Co. Ltd. v. International Tin Council*, *ILM*, vol. 29 (1990), p. 675.

[353] Article 6 (a). *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445. Article 5 reads as follows: "(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization; (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights; (c) In addition, a member State may incur liability to a third party (i) through undertakings by the State, or (ii) if the international organization has acted as the agent of the State, in law or in fact."

[354] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*; *J.H. Rayner* (*Mincing Lane*) *Ltd. v. Department of Trade and Industry and Others*, *ILR*, vol. 80, p. 172.

[355] The conditions set by article 36 of the Vienna Convention on the Law of Treaties would then apply. United Nations, *Treaty Series*, vol. 1155, p. 331.

[356] For instance, article 300, para. 7, of the Treaty establishing the European Community read as follows: "Agreements concluded under the conditions set out in this article shall be binding on the institutions of the Community and on Member States." The European Court of Justice pointed out that this provision did not imply that member States were bound towards non-member States and would as a consequence incur responsibility towards them under international law. See judgment of 9 August 1994, *France v. Commission*, Case C-327/91, *European Court of Justice Reports*, 1994, p. I-3641 at p. I-3674, para. 25.

(8) Paragraph 1 (b) envisages a second case of responsibility of member States: when the conduct of member States has led the third party to rely on the responsibility of member States. This occurs, for instance, when the members lead a third party reasonably to assume that they would stand in if the responsible organization did not have the necessary funds for making reparation.[357]

(9) An example of responsibility of member States based on reliance engendered by the conduct of member States was provided by the second arbitral award in the dispute concerning Westland Helicopters. The panel found that the special circumstances of the case invited:

> "the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States".[358]

(10) Reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the member States to bind themselves. Among the factors that have been suggested as relevant is the small size of membership,[359] although this factor would have to be considered globally, together with all the other pertinent factors. There is clearly no presumption that a third party should be able to rely on the responsibility of member States.

(11) Subparagraphs (a) and (b) use the term "injured party". In the context of international responsibility, this injured party would in most cases be another State or another international organization. However, it could also be a subject of international law other than a State or an international organization. While Part One of the articles on the responsibility of States for internationally wrongful acts covers the breach of any obligation that a State may have under international law, Part Two, which concerns the content of international responsibility, only deals with relations between States, but contains in article 33 a saving clause concerning the rights that may arise for "any person or entity other than a State".[360] Similarly, subparagraph (b) is intended to cover any State, international organization, person or entity with regard to whom a member State may incur international responsibility.

(12) According to subparagraphs (a) and (b) international responsibility arises only for those member States who accepted that responsibility or whose conduct led to reliance. Even when acceptance of responsibility results from the constituent instrument of the organization, this could provide for the responsibility only of certain member States.

(13) Paragraph 2 addresses the nature of the responsibility that is entailed in accordance with paragraph 1. The international responsibility of the international organization of which the State is a member remains unaffected. Acceptance of responsibility by a State could

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[357] C.F. Amerasinghe, "Liability to Third Parties of Member States of International Organizations: Practice, Principle and Juridical Precedent", *International and Comparative Law Quarterly*, vol. 40 (1991), p. 259 at p. 280, suggested that, on the basis of "policy reasons", "the presumption of non-liability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability, even without an express or implied intention to that effect in the constituent instrument". P. Klein, footnote 107 above, pp. 509–510 also considered that conduct of member States may imply that they provide a guarantee for the respect of obligations arising for the organization.

[358] Para. 56 of the award of 21 July 1991, quoted by R. Higgins, "The legal consequences for Member States of non-fulfilment by international organizations of their obligations towards third parties: provisional report", *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 373 at p. 393.

[359] See the comment made by Belarus, A/C.6/60/SR.12, para. 52.

[360] *Yearbook ... 2001*, vol. II (Part Two), p. 94.

entail either subsidiary responsibility or joint and several responsibility. The same applies to responsibility based on reliance. As a general rule, only a rebuttable presumption may be stated. In view of the exceptional character of the cases in which responsibility arises according to the present article, it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.[361]

Article 63
Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

Commentary

(1) The present article finds a parallel in article 19, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is "without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization".

(2) The present article is a saving clause relating to the whole Part. It corresponds to article 19 on the responsibility of States for internationally wrongful acts.[362] The purpose of that provision, which concerns only relations between States, is first to clarify that the responsibility of the State aiding or assisting, or directing and controlling another State in the commission of an internationally wrongful act is without prejudice to the responsibility that the State committing the act may incur. Moreover, as the commentary on article 19 on the responsibility of States for internationally wrongful acts explains, the article is also intended to make it clear "that the provisions [of the chapter] are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful" and to preserve the responsibility of any other State "to whom the internationally wrongful conduct might also be attributable under other provisions of the articles".[363]

(3) There appears to be less need for an analogous "without prejudice" provision in Part Five. It is hardly necessary to save responsibility that may arise for States according to the articles on the responsibility of States for internationally wrongful acts and not according to the present draft articles. On the contrary, a "without prejudice" provision analogous to that of article 19 on the responsibility of States for internationally wrongful acts would have some use if it concerned international organizations. The omission in this Part of a provision analogous to article 19 on the responsibility of States for internationally wrongful acts could have raised doubts. Moreover, at least in the case of a State aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act, there is some use in setting forth that the responsibility of the State is without prejudice to the responsibility of the international organization that commits the act.

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[361] In the Judgment of 27 April 1988 referred to above (footnote 351), Lord Ralph Gibson held that, in case of acceptance of responsibility, "direct secondary liability has been assumed by the members", p. 172.

[362] *Yearbook ... 2001*, vol. II (Part Two), p. 70.

[363] *Ibid.*, pp. 70–71, paras. (2) and (3).

(4) In the present article the references to the term "State" in article 19 on the responsibility of States for internationally wrongful acts have been replaced by references to the term "international organization".

Part Six
General provisions

Commentary

This Part comprises general provisions that are designed to apply to issues concerning both the international responsibility of an international organization (Parts Two, Three and Four) and the responsibility of a State in connection with the conduct of an international organization (Part Five).

Article 64
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Commentary

(1) Special rules relating to international responsibility may supplement more general rules or may replace them, in whole or in part. These special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations. They may also concern matters addressed in Part Five of the present articles.

(2) It would be impossible to try and identify each of the special rules and their scope of application. By way of illustration, it may be useful to refer to one issue which has given rise in practice to a variety of opinions concerning the possible existence of a special rule: that of the attribution to the European Community (now European Union) of conduct of States members of the Community when they implement binding acts of the Community. According to the Commission of the European Union, that conduct would have to be attributed to the Community; the same would apply to "other potentially similar organizations".[364]

(3) Several cases concern the relations between the European Community and its member States. In *M. & Co. v. Germany* the European Commission of Human Rights held:

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[364] A/C.6/56/SR.21, para. 18. This view was developed by P.J. Kuijper and E. Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review*, vol. 1 (2004), p. 111 at p. 127, by S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment?", in: M. Ragazzi (ed.), *International Responsibility Today: Essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), p. 405 at pp. 412–414 and by F. Hoffmeister, "Litigating against the European Union and its member States: who responds under the ILC's draft articles on international responsibility of international organizations?", *European Journal of International Law*, vol. 21 (2010), p. 723.

> "The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities [...] This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the conventional organs."[365]

(4) A different view was taken in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* by a World Trade Organization (WTO) panel, which:

> "accepted the European Communities' explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'".[366]

This approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community.

(5) The issue came before the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*. The Court said in its decision on admissibility in this case that it would examine at a later stage of the proceedings:

> "whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation".[367]

In its unanimous judgment on the merits of 30 June 2005 the Grand Chamber of the Court held:

> "In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act fell within the 'jurisdiction' of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention."[368]

(6) The decision of the European Court of Human Rights in *Kokkelvisserij v. Netherlands* considered "the guarantees offered by the European Community — especially the European Court of Justice — in discharging its own jurisdictional tasks" with regard to

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[365] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.

[366] WTO Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs — Complaint by the United States ("EC – Trademarks and Geographical Indications (US)")*, WT/DS174/R, adopted on 20 April 2005, para. 7.725. With regard to a claim brought against the European Communities, the panel report on *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted on 29 September 2006, para. 7.101, reiterated the same view.

[367] Decision of 13 September 2001, para. A.

[368] *ECHR Reports*, 2005-VI, p. 152, para. 137.

a preliminary reference by a court in the Netherlands. The Court reiterated its view that the conduct of an organ of a member State should in any event by attributed to that State. The Court said:

> "A Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."[369]

(7) The present article is modelled on article 55 on the responsibility of States for internationally wrongful acts.[370] It is designed to make it unnecessary to add to many of the preceding articles a proviso such as "subject to special rules".

(8) Given the particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members, a specific reference to the rules of the organization has been added at the end of the present article. The rules of the organization may, expressly or implicitly, govern various aspects of the issues dealt with in Parts Two to Five. For instance, they may affect the consequences of a breach of international law that an international organization may commit when the injured party is a member State or international organization. The relevance of special rules with regard to the issue of countermeasures has been considered in articles 22 and 52 and the related commentaries.

Article 65

Questions of international responsibility not regulated by these articles

> The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Commentary

(1) Like article 56 on the responsibility of States for internationally wrongful acts,[371] the present article points to the fact that the present draft articles do not address all the issues that may be relevant in order to establish whether an international organization or a State is responsible and what international responsibility entails. This also in view of possible developments on matters that are not yet governed by international law.

(2) Since issues relating to the international responsibility of a State are considered in the present draft articles only to the extent that they are addressed in Part Five, it may seem unnecessary to specify that other matters concerning the international responsibility of a State — for instance, questions relating to attribution of conduct to a State — continue to be governed by the applicable rules of international law, including the principles and rules set forth in the articles on the responsibility of States for internationally wrongful acts. However, if the present article only mentioned international organizations, the omission of a reference to States could lead to unintended implications. Therefore, the present article reproduces article 56 on the responsibility of States for internationally wrongful acts with the addition of a reference to "an international organization".

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[369] Decision of 20 January 2009, application No. 13645/05.

[370] *Yearbook ...*, vol. II (Part Two), p. 140.

[371] *Ibid.*, p. 141.

Article 66
Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Commentary

(1) With the addition of the reference to "an international organization", the present article reproduces article 58 on the responsibility of States for internationally wrongful acts.[372] The statement may appear obvious, since the scope of the present draft articles, as defined in article 1, only concern the international responsibility of an international organization or a State. However, it may not be superfluous as a reminder of the fact that issues of individual responsibility may arise under international law in connection with a wrongful act of an international organization or a State and that these issues are not regulated in the present draft.

(2) Thus, the fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct. On the other hand, when an internationally wrongful act of an international organization or a State is committed, the international responsibility of individuals that have been instrumental to the wrongful act cannot be taken as implied. Howeve:, in certain cases the international criminal responsibility of some individuals may arise, for instance when they have been instrumental to the serious breach of an obligation under a peremptory norm in the circumstances envisaged in article 41.

(3) Individual responsibility could also relate to damage caused by an act of a person acting on behalf of an international organization. For instance, when the victims of an international crime suffer damage, the responsible individual may have an obligation to make reparation.

Article 67
Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

Commentary

(1) The present article reproduces article 59 on the responsibility of States for internationally wrongful acts,[373] which sets forth a "without prejudice" provision concerning the Charter of the United Nations. The reference to the Charter includes obligations that are directly stated in the Charter as well as those flowing from binding decisions of the Security Council, which according to the International Court of Justice similarly prevail over other obligations under international law on the basis of article 103 of the United Nations Charter.[374] According to article 103 of the Charter, "[i]n the event of a

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[372] *Ibid.*, p. 142.

[373] *Ibid.*, p. 143.

[374] Orders on provisional measures in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America), I.C.J. Reports 1992*, p. 15 and p. 126.

conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail".

(2) Insofar as issues of State responsibility are covered in the present draft articles, there could be no reason to query the applicability of the same "without prejudice" provision as the corresponding article on the responsibility of States for internationally wrongful acts. A question may be raised with regard to the responsibility of international organizations, since they are not members of the United Nations and therefore have not formally agreed to be bound by the Charter. However, even if the prevailing effect of obligations under the Charter may have a legal basis for international organizations that differs from the legal basis applicable to States,[375] one may reach the conclusion that the Charter has a prevailing effect also with regard to international organizations. For instance, when establishing an arms embargo which requires all its addressees not to comply with an obligation to supply arms that they may have accepted under a treaty, the Security Council does not distinguish between States and international organizations.[376] It is at any event not necessary, for the purpose of the present draft, to determine the extent to which the international responsibility of an international organization is affected, directly or indirectly, by the Charter of the United Nations.

(3) The present article is not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations.

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[375] One explanation is that Article 103 of the United Nations Charter prevails over the constituent instruments of the international organizations. See R.H. Lauwaars, "The Interrelationship between United Nations Law and the Law of Other International Organizations", *Michigan Law Review*, vol. 82 (1983–1984), p. 1604 ff.

[376] As was noted by B. Fassbender, "The United Nations Charter as Constitution of the International Community", *Columbia Journal of Transnational Law*, vol. 36 (1998), p. 529 at p. 609, "intergovernmental organizations are generally required to comply with Council resolutions".

Chapter VI
Effects of armed conflicts on treaties

A. Introduction

89. During its fifty-sixth session (2004), the Commission decided[377] to include the topic "Effects of armed conflicts on treaties" in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic.

90. At its fifty-seventh (2005) to sixtieth (2008) sessions, the Commission had before it the first to fourth reports of the Special Rapporteur (A/CN.4/552, A/CN.4/570 and Corr.1, A/CN.4/578 and Corr.1 and A/CN.4/589 and Corr.1, respectively), as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1). The Commission further proceeded on the basis of the recommendations of a Working Group,[378] chaired by Mr. Lucius Caflisch, which was established in 2007 and 2008 to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report.

91. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries. At the same meeting, the Commission decided, in accordance with draft articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

92. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie from the Commission.[379]

93. At its sixty-second session (2010), the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments (A/CN.4/622 and Add.1). The Commission considered the Special Rapporteur's first report and subsequently instructed the Drafting Committee to commence the second reading of the draft articles on the basis of the proposals of the Special Rapporteur for draft articles 1 to 17, taking into account the comments of Governments and the debate in the Plenary on the Special Rapporteur's report.

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[377] At its 2830th meeting, on 6 August 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda. The Commission had, at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work. *Ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission. *Ibid.*, annex. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion in the long-term programme of work.

[378] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 324, and *Ibid., Sixty-third Session, Supplement No. 10* (A/63/10), paras. 58–60.

[379] *Ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 229.

B. Consideration of the topic at the present session

94. At the present session, the Commission considered the report of the Drafting Committee (A/CN.4/L.777 and Corr. 1 (French only))[380] at its 3089th meeting, held on 17 May 2011, and adopted the entire set of draft articles on the effects of armed conflicts on treaties, on second reading, at the same meeting.

95. At its 3116th to 3117th meetings, held on 2 and 3 August 2011, the Commission adopted the commentaries to the aforementioned draft articles.

96. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

97. At its 3118th meeting, held on 5 August 2011,[381] the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly:

(a) to take note of the draft articles on the effects of armed conflicts on treaties in a resolution, and to annex them to the resolution;

(b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

D. Tribute to the Special Rapporteur

98. At its 3117th meeting, held on 3 August 2011, the Commission, after adopting the draft articles on the effects of armed conflicts on treaties, adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> *Having adopted* the draft articles on the effects of armed conflicts on treaties,
>
> *Expresses* to the Special Rapporteur, Mr. Lucius Caflisch, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the effects of armed conflicts on treaties."

99. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Sir Ian Brownlie, to the work on the topic.

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[380] At its 3089th meeting, held on 17 May 2011, the Commission decided to request that the Secretariat issue, as part of the Official Records of the Commission, a Note prepared by the Special Rapporteur for consideration by the Drafting Committee in connection with the annex to the draft articles on the effects of armed conflicts. See A/CN.4/645.

[381] The Commission had before it a Note by the Special Rapporteur on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties, A/CN.4/644.

E. Text of the draft articles on the effects of armed conflicts on treaties

1. Text of the draft articles

100. The text of the draft articles adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

Effects of armed conflicts on treaties

Part One
Scope and definitions

Article 1
Scope

The present draft articles apply to the effects of armed conflict on the relations of States under a treaty.

Article 2
Definitions

For the purposes of the present draft articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties;

(b) "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

Part Two
Principles

Chapter I
Operation of treaties in the event of armed conflicts

Article 3
General principle

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

(a) as between States parties to the conflict;

(b) as between a State party to the conflict and a State that is not.

Article 4
Provisions on the operation of treaties

Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.

Article 5
Application of rules on treaty interpretation

The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.

Article 6
Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

(a) the nature of the treaty, in particular its subject-matter, its object and purpose, its content and the number of parties to the treaty; and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.

Article 7
Continued operation of treaties resulting from their subject-matter

An indicative list of treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles.

Chapter II
Other provisions relevant to the operation of treaties

Article 8
Conclusion of treaties during armed conflict

1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.

2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.

Article 9
Notification of intention to terminate or withdraw from a treaty or to suspend its operation

1. A State intending to terminate or withdraw from a treaty to which it is a Party, or to suspend the operation of that treaty, as a consequence of an armed conflict shall notify the other State Party or States Parties to the treaty, or its depositary, of such intention.

2. The notification takes effect upon receipt by the other State Party or States Parties, unless it provides for a subsequent date.

3. Nothing in the preceding paragraphs shall affect the right of a Party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation.

4. If an objection has been raised in accordance with paragraph 3, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable.

Article 10
Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 11
Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the Parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Article 12
Loss of the right to terminate or withdraw from a treaty or to suspend its operation

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 13
Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States Parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in article 6.

Part Three
Miscellaneous

Article 14
Effect of the exercise of the right to self-defence on a treaty

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a Party insofar as that operation is incompatible with the exercise of that right.

Article 15
Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

Article 16
Decisions of the Security Council

The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

Article 17
Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Article 18
Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

Annex

Indicative list of treaties referred to in article 7

(a) Treaties on the law of armed conflict, including treaties on international humanitarian law;

(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(c) Multilateral law-making treaties;

(d) Treaties on international criminal justice;

(e) Treaties of friendship, commerce and navigation and agreements concerning private rights;

(f) Treaties for the international protection of human rights;

(g) Treaties relating to the international protection of the environment;

(h) Treaties relating to international watercourses and related installations and facilities;

(i) Treaties relating to aquifers and related installations and facilities;

(j) Treaties which are constituent instruments of international organizations;

(k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) Treaties relating to diplomatic and consular relations.

2. Text of the draft articles with commentaries thereto

101. The text of the draft articles with commentaries thereto as adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

Effects of armed conflicts on treaties

Part One
Scope and definitions

Article 1
Scope

The present draft articles apply to the effects of armed conflict on the relations between States under a treaty.

Commentary

(1) Article 1 situates, as the point of departure for the elaboration of the draft articles, the Vienna Convention on the Law of Treaties, of 1969 (the "Vienna Convention"),[382] article 73 of which provides, *inter alia*, that the provisions of the Convention do not prejudge any question that may arise in regard to a treaty from the outbreak of hostilities between States.[383] Thus, the present draft articles apply to the effects of an armed conflict in respect of treaty relations between States.

(2) The formulation of article 1 is patterned on article 1 of the Vienna Convention. By using the formulation "relations between States under a treaty", the draft articles also cover the position of States not parties to an armed conflict which are Parties to a treaty with a State involved in that armed conflict. Accordingly, three scenarios would be contemplated: (a) the situation concerning the treaty relations between two States engaged in an armed conflict, including States engaged on the same side; (b) the situation of the treaty relations between a State engaged in an armed conflict with another State and a third State not Party to that conflict; and (c) the situation of the effect of a non-international armed conflict on the treaty relations of the State in question with third States. Article 1, accordingly, should be read in light of article 3 which expressly envisages such hypotheses. The scope of the third scenario is further limited by the requirement of "*protracted* resort to armed force between governmental authorities and organized armed groups", reflected in the definition of armed conflict in article 2, subparagraph (b), as well as by the inclusion of the element of "the degree of outside involvement" as a factor to be taken into account, under article 6, subparagraph (b), when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension. The typical non-international armed conflict should not, in principle, call into question the treaty relations between States.

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[382] United Nations, *Treaty Series*, vol. 1155, p. 331.

[383] At its fifteenth session (1963), the Commission concluded that the draft articles on the law of treaties should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It felt that such a study would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question. Consequently, it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties. *Yearbook ... 1963*, vol. II, para. 14. Article 73 expressly reserving the problem was added at the Vienna Conference.

(3) Several Governments expressed the view that the draft articles should apply also to treaties or parts of treaties which are being provisionally applied.[384] In the Commission's view, the issue can be resolved by reference to the provisions of article 25 of the 1969 Vienna Convention.[385]

(4) The Commission decided not to include within the scope of the draft articles relations arising under treaties between international organizations or between States and international organizations, owing to the complexity of giving such an additional dimension to the draft articles, and which would likely outweigh the possible benefits of doing so since international organizations rarely if ever engage in armed conflict to the extent that their treaty relations may be affected. While it is conceivable that such treaty relations could be affected *qua* third parties in the second scenario envisaged in paragraph (2) above, and that, accordingly, some of the provisions of the present draft articles might apply by analogy, the Commission decided to leave the consideration of such issues to a possible future topic for inclusion in its work programme. However, article 1 should not be read as excluding multilateral treaties to which international organizations are parties in addition to States. This point is made in subparagraph (a) of article 2 which clarifies that the definition of treaties given in the draft articles "includes treaties between States to which international organizations are also parties". Similarly, the formulation "relations between States under a treaty", found in article 1, is drawn from article 2, subparagraph (c), of the Vienna Convention, and places the focus on the relations existing under the treaty regime in question, thereby making it possible to distinguish the treaty relations between States, which are included within the scope of the draft articles, from the relations between States and international organization or between international organizations arising under the same treaty, which are excluded from the scope of the articles.

(5) Structurally the present draft articles are divided into three parts: Part One, entitled "Scope and definitions", includes articles 1 and 2 which are introductory in nature, dealing with scope and definitions. Part Two, entitled "Principles", consists of two chapters. Chapter I, entitled "Operation of treaties in the event of armed conflicts", includes articles 3 to 7 which constitute core provisions reflecting the foundation underlying the draft articles, which is to favour legal stability and continuity. They are reflective of the general principle that treaties are not, in and of themselves, terminated or suspended as a result of armed conflict. Articles 4 to 7 extrapolate, from the general principle in article 3, a number of basic legal propositions which are expository in character. Chapter II, entitled "Other provisions relevant to the operation of treaties", covers articles 8 to 13 which address a variety of ancillary aspects relevant to the application of treaties during armed conflict, drawing, where appropriate, upon corresponding provisions of the 1969 Vienna Convention. Finally, the incidence of armed conflict bears not only on the law of treaties

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[384] See comments by the Netherlands (2005), A/C.6/60/SR.18, para. 40; Malaysia (2006), A/C.6/61/SR.19, para. 48; Romania (2008), A/C.6/63/SR.21, para. 51, and Burundi (2010), A/CN.4/622.

[385] Article 25 of the Vienna Convention reads as follows:

> "**Article 25**
> **Provisional application**
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

but also on other fields of international law, including obligations of States under the Charter of the United Nations. Accordingly, Part Three, entitled "Miscellaneous", includes draft articles 14 to 18 which deal with a number of miscellaneous issues with regard to such relationships through *inter alia* "without prejudice" or saving clauses. An indicative list of treaties whose subject matter involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles, which is linked to article 7.

Article 2
Definitions

For the purposes of the present draft articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties;

(b) "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

Commentary

(1) Article 2 provides definitions for two key terms used in the draft articles.

(2) Paragraph (a) defines the term "treaty" by reproducing the formulation found in article 2 (1) (a) of the Vienna Convention, to which it adds the words "and includes treaties between States to which international organizations are also parties". This inclusion should not be regarded as an indication that the draft articles deal with the position of international organizations. As already explained in paragraph (4) of the commentary to article 1, the treaty relations of international organizations are excluded from the scope of the present draft articles, and the concluding phrase cited above was included to forestall an interpretation of the scope which would have excluded multilateral treaties that include international organizations among their Parties.

(3) No particular distinction is drawn between bilateral and multilateral treaties.

(4) Paragraph (b) defines the term "armed conflict" for the purposes of the present draft articles. It reflects the definition employed by the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* decision,[386] except that the concluding words "or between

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[386] International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72, *Prosecutor v. Duško Tadić a/k/a "DULE"*, Appeals Chamber, 2 October 1995, at para. 70, available at http://www.idi-iil.org/idiE/resolutionsE/1985_hel_03. In this decision, the Tribunal noted that "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".

It should be noted that this definition differs from that adopted by the Institute of International Law; see the 1985 Resolution by the Institute of International Law on "The Effects of Armed Conflicts on Treaties", adopted on 28 August 1985, Session of Helsinki – 1985:

"Article 1

For the purpose of this resolution, the term 'armed conflict' means a state of war or an international conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States such groups within a State" have been deleted since the present draft articles, under article 3, apply only to situations involving at least one State Party to the treaty. The use of this definition is without prejudice to the rules of international humanitarian law, which constitute the *lex specialis* governing the conduct of hostilities.

(5) The definition applies to treaty relations between States parties to an armed conflict, as well as treaty relations between a State party to an armed conflict and a third State. The formulation of the provision and the above reference to "between a State party to the armed conflict and a third State" are intended to cover the effects of an armed conflict which may vary according to the circumstances. Accordingly, it extends to situations where the armed conflict only affects the operation of a treaty with regard to one of the Parties to a treaty, and it recognizes that an armed conflict may affect the obligations of Parties to a treaty in different ways. That phrase also serves to include within the scope of the draft articles the possible effect of non-international armed conflict on treaty relations of a State involved in such a conflict with another State. The emphasis of the effects is on the application or operation of the treaty rather than the treaty itself.

(6) It was also considered that it was desirable to include situations involving a state of armed conflict in the absence of armed actions between the parties.[387] Thus the definition includes the occupation of territory which meets with no armed resistance. In this context the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict are of considerable interest. In its relevant part, article 18 provides as follows:

> "*Article 18 – Application of the Convention*
>
> 1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.
>
> 2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

(7) Similar considerations militate in favour of the inclusion of a blockade even in the absence of armed actions between the parties.[388]

(8) Contemporary developments have blurred the distinction between international and non-international armed conflicts. Non-international armed conflicts have increased in number and are statistically more frequent than international armed conflicts. In addition, many "civil wars" include "external elements", such as the support and involvement by other States to varying degrees, supplying arms, providing training facilities and funds, and so forth. Non-international armed conflicts could affect the operation of treaties as much as international ones. The draft articles therefore include the effect on treaties of non-international armed conflicts, which is indicated by the phrase "resort to armed force

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parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict."

Available at: http://www.idi-iil.org/idiE/resolutionsE/1985_hel_03.

See also article 73 of the Vienna Convention on the Law of Treaties, which refers to "the outbreak of hostilities between States".

[387] See A.D. McNair and A.D. Watts, *The Legal Effects of War*, 4th Ed., Cambridge, Cambridge University Press, 1966, pp. 2–3.

[388] *Ibid.*, pp. 20–21.

between governmental authorities and organized armed groups". At the same time, a threshold requirement is introduced by the inclusion of a qualifier to the effect that such a type of armed conflict needs to be "protracted" in order to constitute the type of conflict covered by the draft articles. As mentioned in paragraph (2) of the commentary to article 1, this threshold serves to mitigate the potentially destabilizing effect that the inclusion of internal armed conflicts within the scope of the present draft articles might have on the stability of treaty relations.

(9) The definition of "armed conflict" includes no explicit reference to "international" or "non-international" armed conflict. This is intended to avoid reflecting specific factual or legal considerations in the article, and, accordingly, running the risk of *a contrario* interpretations.

Part Two
Principles

Chapter I
Operation of treaties in the event of armed conflicts

Commentary

Articles 3 to 7 are central to the operation of the entire set of draft articles. Article 3 establishes their basic orientation, namely, that armed conflict does not, *ipso facto*, terminate or suspend the operation of treaties. Articles 4 to 7 seek to assist the determination of whether a treaty survives in an armed conflict. They are arranged in order of priority. Accordingly, the first step is to look at the treaty itself. Under article 4, an express provision within a treaty regulating its continuity in the context of an armed conflict would prevail. In the absence of an express provision, resort would next be had, under article 5, to the established international rules on treaty interpretation so as to ascertain the fate of the treaty in the event of an armed conflict. If no conclusive answer is yielded by the application of those two articles, the enquiry will shift to considerations extraneous to the treaty, and article 6 provides a number of contextual factors that may be relevant in making a determination one way or the other. Finally, the determination is further assisted by article 7 which refers to the indicative list of treaties, contained in the annex, the subject matter of which provides an indication that they continue in operation, in whole or in part, in time of armed conflict.

Article 3
General principle

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

(a) as between States parties to the conflict;

(b) as between a State party to the conflict and a State that is not.

Commentary

(1) Article 3 is of overriding significance. It establishes the general principle of legal stability and continuity. To that end it incorporates the key developments embodied by the Institute of International Law in its 1985 resolution: the existence of an armed conflict does not *ipso facto* cause the suspension or termination of a treaty. At the same time, it must be recognized that there is no easy way of reconciling the principle of stability, in article 3, with the fact that the existence of armed conflict may result in the termination or suspension of treaty relations. The Commission consciously decided not to adopt an affirmative formulation establishing a presumption of continuity, out of concern that such approach

would not necessarily reflect the prevailing position under international law, and because it implied a reorientation of the draft articles from providing for situations where treaties are assumed to continue, to attempting to indicate situations when such a presumption of continuity would not apply. The Commission was of the view that such a reorientation would be too complex and fraught with risks of unanticipated *a contrario* interpretations. It considered that the net effect of the present approach of seeking merely to dispel any assumption of discontinuity, together with several indications of when treaties are assumed to continue, was to strengthen the stability of treaty relations.

(2) The formulation is based on article 2[389] of the resolution adopted by the Institute of International Law in 1985. The principle has been commended by a number of authorities. Oppenheim asserts that "the opinion is pretty general that war by no means annuls every treaty".[390] McNair states: "It is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents."[391] During the work of the Institute in 1983 Briggs said that:

> "Our first — and most important — rule is that the mere outbreak of armed conflict (whether declared war or not) does not *ipso facto* terminate or suspend treaties in force between parties to the conflict. This is established international law."[392]

The same conclusion results from the case-law. While the British High Court of Admiralty found in 1817, in "*The Louis*" case, that "[t]reaties are perishable things and their obligations are dissipated by the first hostility",[393] other judgments are less categorical and, as is now provided for by article 3 of the present draft articles, hold that the existence of armed conflict does not, in and of itself, do away with treaties or suspend them. This is, in particular, the conclusion reached by United States courts, the leading case being that of *Society for the Propagation of the Gospel v. Town of New Haven* (1823), where the Supreme Court said that:

> "treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, suspended while it lasts".[394]

A more recent case is that of *Karnuth v. United States* (1929), where the United States Supreme Court, dealing with Article III of the Jay Treaty of 1794 between Britain and the United States, confirmed and developed its earlier ruling:

> "The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent

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[389] Article 2 of the resolution of the Institute reads as follows:

> "The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict."

[390] H. Lauterpacht (ed.), *Oppenheim's International Law*, vol. II, *Disputes, War and Neutrality*, London, Longman, 1948, p. 302.

[391] A.D. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, p. 697.

[392] *Annuaire de l'Institut de droit international*, vol. 61 (I), pp. 8 and 9; see also H. Briggs, *The Law of Nations*, 2nd ed., London, Stevens & Sons, 1953, p. 938.

[393] 15 December 1817, *British International Law Cases*, vol. 3, p. 691, at p. 708.

[394] *American International Law Cases (AILC)*, vol. 19, p. 41, at p. 48, 21 U.S. (8 Wheat.) 464.

> completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote relations of harmony between nation and nation', are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war."[395]

Although the above passages could suggest that a treaty may be suspended as long as the war lasts, this is no longer the line followed. The new line, rather, is to limit termination to "political" treaties, treaties "incompatible with the existence of hostilities", and treaties the maintenance of which is "incompatible with national policy in time of war".[396]

While the leading judgments on this matter are not always models of clarity, it has become evident that, under contemporary international law, the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements, although a number of them may indeed lapse or be suspended on account of their nature, commercial treaties for instance.[397]

(3) The reference in the chapeau to the "existence" of an armed conflict indicates that the draft articles cover the effect on treaties not only at the outbreak of the conflict, but also throughout its duration.

(4) Subparagraphs (a) and (b) establish the various hypotheses of parties covered by the present draft articles, as described in paragraph (2) of the commentary to article 1. The article is therefore to be distinguished from that adopted by the Institute of International Law in that, while the Institute's resolution is concerned with the fate of treaties in force between States parties to the armed conflict, the present draft articles cover the additional hypotheses discussed in the context of article 1.

(5) The possibility of including withdrawal from a treaty as one of the consequences of an outbreak of armed conflict, alongside suspension or termination, in article 3, was considered but rejected since withdrawal involves a conscious decision by a State, whereas article 3 deals with the automatic application of law.

Article 4
Provisions on the operation of treaties

Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.

Commentary

(1) Article 4 recognizes the possibility of treaties expressly providing for their continued operation in situations of armed conflict. It lays down the general rule that where a treaty so provides it continues to operate in situations of armed conflict. The effect of this rule is that, in principle, the first step of the inquiry should be to establish whether the treaty so provides, since it will, depending on the terms of the provision and its scope, settle the question of continuity. This is indicated by placing article 4 immediately after article 3.

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[395] *Ibid.*, vol. 19, p. 49, at pp. 52–53.

[396] *Techt v. Hughes*, *International Law Reports* (*ILR*), vol. 1, No. 271; *Clark v. Allen*, *AILC*, vol. 19, p. 70.

[397] *Russian-German Commercial Treaty* case, German *Reichsgericht*, 23 May 1925, *Annual Digest of Public International Law Cases (AD)* 1925–1926, No. 331. See also *Rosso v. Marro*, Tribunal civil de Grasse, 18 January 1945, *ibid.*, 1943–1945, No. 104, and *Bussi v. Menetti*, France, *Cour de cassation (Chambre civile)*, 5 November 1943, *ibid.*, 1943–1945, No. 103.

(2) The Commission considered whether or not to include the qualifier "expressly", but decided against doing so as it regarded it as being redundant. Furthermore, it was found that such a qualifier could be unnecessarily limiting, since there were treaties which, although not expressly providing therefor, continued in operation by implication through the application of articles 6 and 7.

(3) On a strict view, this article may seem redundant, but it was generally recognized that such a provision was justified in the cause of expository clarity.

Article 5
Application of rules on treaty interpretation

> The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.

Commentary

(1) Article 5 follows from article 4 in that it represents the next stage of the inquiry if the treaty itself does not contain a provision regulating continuity or if the application of article 4 proves inconclusive. It is also the second provision, in sequence, focusing on an investigation internal to the treaty as distinct from the consideration of factors external to the treaty, referred to in article 6, which might provide an indication on the treaty's susceptibility to termination or withdrawal or suspension of operation. The provision is intentionally drafted in an open-ended manner ("to establish whether"), so as to anticipate the possibility of applying articles 6 and 7 if the process of interpreting the treaty, too, proves inconclusive.

(2) Article 5 thus requires that, in the absence of a clear indication in the text of the treaty itself, one should seek to ascertain its meaning through the application of the established rules of international law on treaty interpretation, by which the Commission chiefly had in mind articles 31 and 32 of the 1969 Vienna Convention. The Commission preferred to retain a more general reference to the "rules of international law", however, out of recognition that not all States are Parties to the Vienna Convention, and out of deference to its general policy of not including in its texts cross-references to other legal instruments.

(3) The Commission rejected the inclusion of a reference to the intention of the parties to the treaty. This idea had proved controversial both among Governments and in the Commission itself. It was acknowledged that the drafters of treaties rarely provide an indication of their intention regarding the effect of the existence of an armed conflict on the treaty. Wherever such an intention is discernible, it would most likely be through a provision of the treaty itself – a practice worth encouraging. Such a case would be covered by article 4. A reference to the intention of the parties could also have been interpreted as a re-introduction of a subjective test, despite the fact that the Vienna Conference had clearly opted for an objective test focusing on the "meaning" of the treaty. Nonetheless, it is acknowledged that the criterion of the intention of the parties is implicit in the process of making the determinations set out in article 31 of the Vienna Convention.

(4) The title of article 5 is formulated in such a manner as to confirm that the provision is not concerned with treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation are to be applied. As with article 4, the provision is strictly not necessary as one would typically seek to interpret the treaty in any event. Nonetheless, the provision was included by way of providing expository clarity.

Article 6
Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.

Commentary

(1) Article 6 derives from article 3. The existence of an armed conflict does not *ipso facto* put an end to or suspend the operation of the treaty. It is another key provision of the present draft articles, and follows, in sequence, the investigation undertaken on the basis of the treaty itself, pursuant to articles 4 and 5. If the analysis under those provisions proves inconclusive, article 6 will apply. The article highlights certain criteria, including criteria external to the treaty, which may assist in ascertaining whether the treaty is susceptible to termination, withdrawal or suspension.

(2) With regard to the chapeau of the provision, and in contrast to article 3, withdrawal from treaties as one of the possibilities open to States parties to an armed conflict is included as it provides an appropriate context for its inclusion in subsequent ancillary draft articles. The article enumerates, in subparagraphs (a) and (b), two categories of factors which may be relevant in ascertaining its susceptibility to termination, withdrawal or suspension in the event of an armed conflict. This indication of factors is not exhaustive, as is confirmed by the concluding clause of the chapeau: "regard shall be had to all relevant factors, including ...". This suggests: (1) that there may be factors others than those listed in the subparagraphs which may be relevant in the context of a particular treaty or armed conflict; and (2) that not all factors are equally relevant in all cases – some may be more relevant that others, depending on the treaty or the conflict. As such, the factors in subparagraphs (a) and (b) are to be viewed as a mere mention of the factors that could prove relevant in particular cases, depending on the circumstances.

(3) Subparagraph (a) suggests a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of the parties to the treaty. While a measure of overlap exists with regard to the inquiry undertaken under article 5, for example, the object and purpose of the treaty when taken in combination with other factors such as the number of parties, may open up a new perspective. Although the Commission did not find it practicable to suggest more specific guidelines on how to assess the nature, subject matter, object and purpose and content of a treaty in the context of an armed conflict, given the wide variety of treaties, it has suggested a list of categories of treaties in the annex linked to article 7 which exhibit a high likelihood of continued applicability, in whole or in part, during armed conflict. As regards the number of parties, no definitive position is being taken except to suggest that the potential effect on treaties with numerous parties, which are not parties to the armed conflict, should, as a matter of policy, be mitigated.

(4) Subparagraph (b) provides a second set of suggested factors, this time pertaining to the characteristics of the armed conflict. Here the suggested factors are: the territorial extent of the conflict (and whether it takes place on land or at sea, which may be relevant, for

example, when it comes to ascertaining the impact of an armed conflict on air transportation agreements), its scale, intensity and duration. In addition, given the scope of the draft articles, which includes conflicts of a non-international character, mention is made of "the degree of outside involvement" in such a conflict. This latter element establishes an additional threshold intended to limit the possibility for States to assert the termination or suspension of the operation of a treaty, or a right of withdrawal, on the basis of their participation in such types of conflicts. In other words, this element serves as a factor of control to favour the stability of treaties: the greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties will be affected, and vice versa.

(5) The question of the legality of the use of force as one of the factors to be considered under article 6 was examined, but it was decided to resolve the matter in the context of articles 14 to 16.

(6) It cannot be assumed that the effect of armed conflict between Parties to the same treaty would be the same as its effect on treaties between a party to an armed conflict and a third State.

Article 7
Continued operation of treaties resulting from their subject matter

An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex of the present draft articles.

Commentary

Article 7, which is expository in character, is linked to article 6, subparagraph (a), in that it further elaborates on the element of the "subject matter" of a treaty which may be taken into account when ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. The provision establishes a link to the annex which contains an indicative list of categories of treaties involving an implication that they continue in operation, in whole or in part, during armed conflict. The commentary relating to each category of treaties will be found in the annex at the end of the present draft articles.

Chapter II
Other provisions relevant to the operation of treaties

Article 8
Conclusion of treaties during armed conflict

1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.

2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.

Commentary

(1) Article 8 is in line with the basic policy of the draft articles, which seek to ensure the legal security and continuity of treaties. Both provisions reflect the fact that States may, in times of armed conflict, continue to have dealings with one another.

(2) Paragraph 1 of article 8 reflects the basic proposition that an armed conflict does not affect the capacity of a State party to that conflict to enter into treaties. While the provision

includes a general reference to "international law", the Commission understood this as referring to the international rules on the capacity of States to conclude treaties reflected in the 1969 Vienna Convention.

(3) While technically speaking paragraph 1 deals with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect on treaties themselves, it was thought useful to retain it for expository purposes. The provision refers to the capacity "of a State party to that conflict" so as to indicate that there may be only one State party to the armed conflict, as in situations of non-international armed conflict.

(4) Paragraph 2 deals with the practice of States parties to an armed conflict expressly agreeing, during the conflict, either to suspend or to terminate a treaty which is operative between them at the time. As McNair has remarked: "There is no inherent juridical impossibility ... in the formation of treaty obligations between two opposing belligerents during the war."[398] Such agreements have been concluded in practice, and a number of writers have referred to them. Partly echoing McNair, Fitzmaurice observed in his Hague Lectures:

> "... there is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war. This is indeed what happens when, for instance, an armistice agreement is concluded between belligerents. It also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on. These agreements may have to be concluded through the medium of a third neutral State or protecting power. but once concluded they are valid and binding international agreements".[399]

(5) The Commission decided not to make reference to the "lawfulness" or "validity" of the agreements contemplated in paragraph 2, preferring to leave such matters to the operation of the general rules of international law, including those reflected in the 1969 Vienna Convention.

(6) Reference is made, at the end of paragraph 2, to the possibility of agreeing on the amendment or modification of the treaty. The Commission had in mind the position of States Parties to the treaty which are not parties to the armed conflict. Such States could conceivably not be in a position to justify termination or suspension of operation, thus only leaving them the possibility to seek the modification or amendment of the treaty.

Article 9

Notification of intention to terminate or withdraw from a treaty or to suspend its operation

1. A State intending to terminate or withdraw from a treaty to which it is a Party, or to suspend the operation of that treaty as a consequence of an armed conflict, shall notify the other State Party or States Parties to the treaty, or its depositary, of such intention.

2. The notification takes effect upon receipt by the other State Party or States Parties, unless it provides for a subsequent date.

3. Nothing in the preceding paragraphs shall affect the right of a Party to object within a reasonable time, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal or suspension of its operation.

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[398] McNair, *The Law of Treaties* (footnote 391 above), p. 696.

[399] "The Juridical Clauses of the Peace Treaties", *Recueil des Cours* ..., vol. 73 (1948-II), p. 309.

4. If an objection has been raised in accordance with paragraph 3, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable.

Commentary

(1) Article 9 establishes a basic duty of notification of termination, withdrawal or suspension from the treaty. Its text is based on that of article 65 of the 1969 Vienna Convention, but streamlined and adjusted to the context of armed conflict. The intention behind article 9 is to establish a basic duty of notification, while recognizing the right of another State Party to the treaty to raise an objection, which would remain unresolved, however, until a solution is reached through any one of the means listed in Article 33 of the Charter of the United Nations.

(2) Paragraph 1 formulates the basic duty for a State intending to terminate or withdraw from a treaty, or to suspend its operation, to notify that other State Party or States Parties to the treaty, or its depositary, of its intention. Such notification is a unilateral act through which a State, upon the existence of an armed conflict, informs the other contracting State or States or the depositary if there is one, of its intention to terminate the treaty, to withdraw from it or to suspend its operation. Performance of this unilateral act is not required when the State in question does not wish to terminate or withdraw from the treaty or to suspend its operation. This is a consequence of the general rule set out in article 3, which provides that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

(3) Paragraph 2 establishes the point in time when the notification takes effect: upon its receipt by the other State or States Parties, unless a later date is provided for in the notification. Contrary to paragraph 1, no reference is made to the date of receipt by the depositary. There are treaties which do not have depositaries. Accordingly, the possibility of notifying either the States Parties *or* the depositary had to be provided for in paragraph 1. However, as regards the taking effect of the notification, what is important is the moment at which the other State Party or States Parties receive the notification and not the moment at which the depositary receives it. Nonetheless, for those treaties which do have depositaries through whom the notification is made, the notification takes effect when the State for which it is intended receives it from the depositary.

(4) The purpose of paragraph 3 is to preserve the right that may exist under a treaty or general international law to object to the proposed termination, suspension or withdrawal of the treaty. Hence, the objection is to the intention to terminate, suspend or withdraw, which is communicated by the notification envisaged in paragraph 1. While it acknowledged that it was somewhat unrealistic to impose time-limits in the context of armed conflict, especially in light of the difficulties to establish a definitive point in time from which such limit would run, the Commission nonetheless was of the view that the lack of a deadline would undermine the efficacy of the provision and could give rise to disputes as to the legal consequences of the notifications envisaged in paragraph 1. With both considerations in mind, the Commission decided against indicating a specific time-period and instead opted for a "reasonable" period ("within a reasonable time"). What is "reasonable" in relation to a particular treaty and conflict would be the subject of determination by the dispute-settlement procedure envisaged in paragraph 4 and would depend on the circumstances of the case, taking into account, *inter alia*, the factors enumerated in article 6.

(5) Paragraph 4 establishes the procedural requirement that, in the event of an objection having been raised, pursuant to paragraph 3, the States concerned would need to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations, which provides:

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

(6) A notification made by a State Party under paragraph 1 takes effect when it has been received by the other State Party or State Parties, unless the notification provides for a subsequent date (para. 2). If no objection is received within a reasonable period of time, the notifying State may take the measure indicated in the notification (para. 3). If an objection is received, the issue will remain open between the States concerned until there is a diplomatic or legal settlement pursuant to paragraph 4.

(7) Paragraph 5 contains a saving clause preserving the rights or obligations of States in matters of dispute settlement, to the extent that they have remained applicable in the event of an armed conflict. The Commission considered it useful to include this provision so as to discourage any interpretation of paragraph 4 as implying that States involved in an armed conflict operate from a clean slate when it comes to the peaceful settlement of disputes. The adoption of this provision is also in line with the inclusion, in paragraph (k) of the annex, of treaties relating to the settlement of international disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement.

Article 10
Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Commentary

(1) Articles 10 to 12 seek to establish a modified regime modelled on articles 43 to 45 of the Vienna Convention. Article 10 has its roots in article 43 of the Vienna Convention. Its purpose is to preserve the requirement to fulfil an obligation under general international law in cases where the same obligation appears in a treaty which has been terminated or suspended, or from which the State Party concerned has withdrawn as a consequence of an armed conflict. This latter point, namely, the linkage to the armed conflict, has been added in order to put the provision into its proper context for the purposes of the present draft articles.

(2) The principle set out in this article seems self-evident: customary international law continues to apply independently of treaty obligations. In a famous *dictum* in the *Nicaragua* case, the International Court of Justice said:

> "The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as

principles of customary law, even as regards countries that are parties to such conventions."[400]

Article 11
Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the Parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Commentary

(1) Article 11 deals with the separability of provisions of treaties affected by an armed conflict. This provision plays a key role in the present draft articles by "moderating" the impact of the operation of articles 4 to 7 by providing for the possibility of differentiated effects on a treaty.

(2) The present provision is based on its counterpart in article 44 of the Vienna Convention. Subparagraphs (a) to (c) reproduce verbatim the text of their equivalents in that Convention.

(3) Regarding the requirement that the continued performance of the remainder of the treaty may not be "unjust", the Commission recalled that this provision was introduced into article 44 of the 1969 Convention at the behest of the United States of America. As Mr. Kearney, the United States representative, explained:

> "It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties."[401]

In other words, as is the case with article 44, paragraph 3 (c), of the Vienna Convention, subparagraph (c) of draft article 11 is a general clause that may be invoked if the separation of treaty provisions — to satisfy the wishes of the requesting Party — would create a significant imbalance to the detriment of the other Party or Parties. It thus complements subparagraphs (a) (separability with regard to application) and (b) (acceptance of the clause or clauses whose termination or invalidity is requested was not an essential basis of the consent of the other Party or Parties to be bound by the treaty).

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[400] *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application*, Judgment of 26 November 1984, *I.C.J. Reports 1984*, p. 392, para. 73; see also Judge Morelli's dissenting opinion in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, at p. 198.

[401] Statement made by Mr. Kearney, Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.68.V.7), 41st meeting of the Committee of the Whole, 27 April 1968, para. 17. For the United States proposal, see A/CONF.39/C.1/L.260, which was reproduced in Official Records of the United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), para. 369.

Article 12
Loss of the right to terminate or withdraw from a treaty or to suspend its operation

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Commentary

(1) Article 12 is based on the equivalent provision of article 45 of the 1969 Vienna Convention. It deals with the loss of the right to terminate a treaty, to withdraw from it or to suspend its operation. It amounts to a recognition that a minimum of good faith must prevail even in times of armed conflict.

(2) To make it clear that article 12 is to apply in the context of an armed conflict, an appropriate reference has been added in the chapeau. The Commission understood the part of the sentence referring to "awareness of the facts", drawn from article 45 of the 1969 Convention, as relating not only to the existence of the armed conflict but also to the practical consequences thereof in terms of the possible effect of the conflict on the treaty.

(3) It is acknowledged that the situation pertaining to a treaty in the context of an armed conflict can only be assessed once the conflict has produced its effect on the treaty – which may not have been the case at its outbreak. The most that can be said is that States are encouraged to refrain from undertaking the actions referred to in this article until the effects of the conflict on the treaty have become reasonably clear.

(4) The reference in the title to the various actions which can be taken ("to terminate or withdraw from a treaty or to suspend its operation") is to be understood as a reference to the preceding articles which set out what rights a State would have and the applicable conditions.

Article 13
Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in article 6.

Commentary

(1) Article 13 concerns the question of the revival (in paragraph 1) or resumption (para. 2) of treaty relations subsequent to an armed conflict.

(2) Paragraph 1 formulates the general rule: that, whether a treaty has been terminated or suspended in whole or in part, the States Parties may, if they wish, conclude an agreement to revive or render operative even agreements or parts thereof that have ceased to exist. This is a consequence of the freedom to conclude treaties and cannot be undertaken unilaterally. Accordingly, the paragraph deals with situations where the status of "pre-war" agreements is ambiguous and where it is necessary to draw an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as terminated or suspended as a consequence of an armed conflict. Specific agreements regulating the revival of such treaties are not prejudiced by the present provision. An agreement of this type can be found, *e.g.*, in Article 44 of the Peace Treaty concluded on 10 February 1947 between Italy and the Allied Powers. That Article provides that each Allied Power may, within a time-limit of six months, notify Italy of the treaties it wishes to revive.

(3) Paragraph 2, which deals with the resumption of treaties which were suspended as a consequence of an armed conflict, is narrower: it applies only to treaties that have been suspended as a consequence of the application of article 6. Since in such a case the treaty has been suspended at the initiative of one State Party — also a party to the armed conflict — on the basis of the factors mentioned in article 6 those factors cease to apply when the armed conflict is over. As a result, the treaty can become operative once again, unless other causes of termination, withdrawal or suspension have emerged in the meantime (in accordance with article 18), or unless the Parties have agreed otherwise. Resumption may be called for by one or several States Parties, as it is no longer a matter of agreement between States. The result of such an initiative will be determined in accordance with the factors listed in article 6.

(4) The question of when a treaty is resumed should be dealt with on a case-by-case basis.

Part Three
Miscellaneous

Article 14
Effect of the exercise of the right to self-defence on a treaty

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a Party insofar as that operation is incompatible with the exercise of that right.

Commentary

(1) Article 14 is the first of three articles which are based on the relevant resolution of the Institute of International Law adopted at its Helsinki session in 1985.[402] It reflects the need for a clear recognition that the article does not create advantages for an aggressor State. The same policy imperative is reflected in articles 15 and 16, which complement the present provision.

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[402] In particular, article 7 of the resolution of the Institute reads as follows:

> "A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor."

(2) The article covers the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. Such State is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right. The article has to be understood against the background of the application of the regime under the Charter of the United Nations, as contemplated in articles 15 and 16. It accordingly also aims at preventing impunity for the aggressor and any imbalance between the two sides, which would undoubtedly emerge if the aggressor, having disregarded the prohibition on the use of force set out in article 2, paragraph 4, of the Charter, were able, at the same time, to require the strict application of the existing law and thus deprive the attacked State, in whole or in part, of its right to defend itself. At the same time, article 14 is subject to the application of articles 6 and 7: a consequence that would not be tolerated in the context of armed conflict can equally not be accepted in the context of self-defence. For example, the right provided for does not prevail over treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and on the law of armed conflict, such as the Geneva Conventions of 1949.[403]

(3) While the provision envisages the suspension of agreements between the aggressor and the victim, it does not exclude cases — perhaps less likely to occur — of treaties between the State that is the victim of the aggression and third States. The article does not, however, concern non-international armed conflicts since it refers to self-defence within the meaning of Article 51 of the Charter of the United Nations. The right envisaged in article 14 is limited to suspension and does not provide for termination.

(4) No attempt has been made to prescribe a comprehensive treatment of the legal consequences of the exercise of the inherent right to self-defence. Article 14 is, therefore, without prejudice to the applicable rules of international law concerning issues of notification, opposition, time-limits and peaceful settlement.

Article 15
Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

Commentary

(1) Article 15 prohibits an aggressor State from benefiting from the possibility of termination of or withdrawal from a treaty, or of suspension of its operation, as a consequence of the armed conflict that State has provoked. Its formulation is based on article 9 of the resolution of the Institute of International Law,[404] with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that the treaties dealt with are those that are terminated, withdrawn from or suspended *as a consequence* of the armed conflict in question.

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[403] Geneva Conventions of 12 August 1949 on the Protection of War Victims, United Nations, *Treaty Series*, vol. 75, p. 31, vol. 75, p. 85, vol. 75, p. 135, and vol. 75, p. 287.

[404] Article 9 of the resolution of the Institute reads as follows:

> "A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State."

(2) The characterization of a State as an aggressor will depend, fundamentally, on the definition given to the word "aggression" and, in terms of procedure, on the Security Council. If the Council determines that a State wishing to terminate or withdraw from a treaty or suspend its operation — which presupposes that the case has been referred to the Council — is an aggressor, that State may not take those measures or, in any case, may do so only insofar as it does not benefit from them; this latter point may be assessed either by the Council or by a judge or arbitrator. In the absence of such a determination, the State may act under article 4 and the following articles.

(3) From the moment of the commission of the aggression, the State characterized as an aggressor by the attacked State may no longer, under article 9, claim the right to terminate a treaty, to withdraw from it or suspend its operation, unless it derives no benefit from doing so. It may claim the right anyway, arguing that no aggression has been committed or that its adversary is the aggressor. The situation will therefore remain in limbo until the second stage, which is the determination by the Security Council. That action determines what follows: if the State initially considered to be the aggressor turns out not to be, or if it does not benefit from the aggression, the notification that it may have made under article 9 will be assessed in accordance with the ordinary criteria established in the draft articles. If, on the other hand, the State is confirmed as the aggressor and has benefited from setting aside its treaty obligations, such criteria are no longer applicable when it comes to determining the legitimacy of termination, withdrawal or suspension. In other words, when a State gives notification of termination of or withdrawal from the treaty, or of suspension of its operation, and is then determined to be an aggressor, it will be necessary to establish whether or not it benefits from the termination, withdrawal or suspension. If it does, the notification has no effect unless the treaty in question sets out particular rules in that regard.

(4) The words "as a consequence of an armed conflict that results from the act of aggression" serve to limit the characterization as an aggressor State to the conflict in question, thus avoiding an interpretation that that State will retain such designation even in the context of entirely different conflicts with the same opposing State or even with a third State.

(5) The Commission decided not to go beyond a formula referring to the resort to armed force in violation of the Charter of the United Nations.

(6) The title of the article emphasizes the fact that the provision deals less with the question of the commission of aggression, and more with the possible benefit, in terms of the termination, withdrawal from or suspension of a treaty that might be derived from an aggressor State from the armed conflict in question.

Article 16
Decisions of the Security Council

The present draft articles are without prejudice to the relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

Commentary

(1) Article 16 seeks to preserve the legal effects of decisions of the Security Council taken under the Charter of the United Nations. While the Council's actions under Chapter VII of the Charter are arguably the most relevant in the context of the present draft articles, the Commission recognized that the actions of the Council taken under other provisions of the Charter, such as article 94 on the enforcement of judgments of the International Court of Justice, may be equally relevant. Article 16 has the same function as article 8 of the 1985

resolution of the Institute of International Law.[405] The Commission decided to present the provision in the form of a "without prejudice" clause instead of the formulation adopted by the Institute which was cast in more affirmative terms.

(2) Article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. In addition to the rights and obligations contained in the Charter itself, article 103 applies to obligations flowing from binding decisions taken by United Nations bodies. In particular, the primacy of Security Council decisions under article 103 has been widely accepted in practice as well as in writings on international law.[406]

(3) Article 16 leaves open the variety of questions that may arise as a consequence of article 103.

Article 17

Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Commentary

(1) Article 17 is another "without prejudice" clause, which seeks to preserve the rights and duties of States arising from the laws of neutrality. This wording has been preferred to a more specific reference to the "status of third States as neutrals". It was felt that the reference to "neutrals" was, as a matter of drafting, imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The present provision is accordingly more of a saving clause.

(2) As a status derived from a treaty, neutrality becomes fully operational only at the outbreak of an armed conflict between third States; it is therefore clear that it survives the conflict since it is precisely in periods of conflict that it is intended to apply. Moreover, the status of neutrality is not always derived from a treaty. The question of the applicability of the laws of neutrality does not generally arise in terms of the survival of the status of neutrality but in relation to the specific rights and duties of a State that is neutral and remains neutral; pursuant to article 17, these rights and duties prevail over the rights and duties arising from the present draft articles.

Article 18

Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

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[405] Article 8 of the resolution of the Institute reads as follows:

> "A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution."

[406] See in particular Analytical Study of the Study Group of the Commission on Fragmentation of International Law (A/CN.4/L.682, paras. 328–340).

Commentary

(1) Article 18 preserves the possibility of termination or withdrawal of a treaty, or of suspension thereof, arising from the application of other rules of international law, in the case of the examples drawn from the 1969 Vienna Convention, in particular articles 55 to 62. The reference to "Other" in the title is intended to indicate that these grounds are additional to those in the present draft articles. The word "*inter alia*" seeks to clarify that the grounds listed in article 18 are non-exhaustive.

(2) Whilst this provision may be thought to state the obvious, the clarification was considered useful. It was to dispel the possible implication that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal or suspension.

Annex

Indicative list of treaties referred to in article 7

(a) Treaties on the law of armed conflict, including treaties on international humanitarian law;

(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(c) Multilateral law-making treaties;

(d) Treaties on international criminal justice;

(e) Treaties of friendship, commerce and navigation and agreements concerning private rights;

(f) Treaties for the international protection of human rights;

(g) Treaties relating to the international protection of the environment;

(h) Treaties relating to international watercourses and related installations and facilities;

(i) Treaties relating to aquifers and related installations and facilities;

(j) Treaties which are constituent instruments of international organizations;

(k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) Treaties relating to diplomatic and consular relations.

Commentary

(1) The present annex contains an indicative list of categories of treaties the subject matter of which carries an implication that they continue in operation, in whole or in part, during armed conflict. It is linked to article 7 and was included, as has been explained in the commentary to that provision, to further elaborate on the element of "subject matter" of treaties contained among the factors, listed in subparagraph (a) of article 6, to be taken into account when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension in the event of an armed conflict.

(2) The effect of such an indicative list is to create a set of rebuttable presumptions based on the subject matter of those treaties: the subject matter of the treaty implies that the

treaty survives an armed conflict. Although the emphasis is on *categories* of treaties, it may well be that only the subject matter of particular provisions of the treaty carries the implication of continuance.

(3) The list is purely indicative, as confirmed by the use of that adjective in article 7, and no priority is in any way implied by the order in which the categories are presented. Moreover, it is recognized that in certain instances the categories are overlapping. The Commission decided not to include within the list an item referring to *jus cogens*. This category is not qualitatively similar to the other categories which have been included in the list. The latter are subject-matter based, whereas *jus cogens* cuts across several subjects. It is understood that the provisions of articles 3 to 7 are without prejudice to the effect of principles or rules included in treaties and having the character of *jus cogens*.

(4) The list reflects available State practice, particularly United States practice, and is based on the views of several generations of writers. It must be admitted, however, that the likelihood of a substantial flow of information from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult. Apparent examples of State practice often concern legal principles which bear no relation to the specific issue of the effect of armed conflict on treaties. Thus some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant. In some areas, such as that of treaties creating permanent regimes, State practice offers a firm basis. In other areas there may be a firm basis in the case law of municipal courts and in some executive advice given to courts.

(a) *Treaties on the law of armed conflict, including treaties on international humanitarian law*

(5) It seems evident that, being intended to govern the conduct and the consequences of armed conflicts, treaties relating thereto, including those bearing on international humanitarian law, apply in the event of such conflicts. As pointed out by McNair:

> "[t]here is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination".[407]

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[407] McNair, *The Law of Treaties* (footnote 391 above) 1961, p. 704.

> "There were in existence at the outbreak of the First World War a number of treaties (to which one or more neutral States were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856, and certain of the Hague Conventions of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other prize courts turned upon them. Moreover, they were not specifically revived by or under the treaties of peace. Whether this legal result is attributable to the fact that the contracting parties comprised certain neutral States or to the character of the treaties as the source of general rules of law intended to operate during war is not clear, but it is believed that the latter was regarded as the correct view. If evidence is required that the Hague Conventions were considered by the United Kingdom Government to be in operation after the conclusion of peace, it is supplied by numerous references to them in the annual British lists of 'Accessions, Withdrawals, etc.', published in the British Treaty Series during recent years, and by the British denunciation in 1925 of Hague Convention VI of 1907. Similarly in 1923 the United Kingdom Government, on being asked by a foreign Government whether it regarded the Geneva Red Cross Convention of 6 July 1906 as being still in force between the ex-Allied Powers and the ex-enemy Powers, replied that in the view of His Majesty's Government this convention, being of

(6) The present category is not limited to treaties expressly applicable during armed conflict. It covers, broadly, agreements relating to the law of armed conflict, including treaties relating to international humanitarian law. As early as 1785, article 24 of the Treaty of Friendship and Commerce between Prussia and the United States of America expressly stated that armed conflict had no effect on its humanitarian law provisions.[408] Moreover, the *Third Restatement of the Law*, while re-stating the traditional position that the outbreak of war between States terminated or suspended agreements between them, acknowledges that "agreements governing the conduct of hostilities survived, since they were designed for application during war ...".[409] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice found that:

> "as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter) to all international armed conflict, whatever type of weapons might be used".[410]

(7) The implication of continuity does not affect the operation of the law of armed conflict as *lex specialis* applicable to armed conflict. The mention of this category of treaties does not address numerous questions that may arise in relation to the application of that law. Nor is it intended to prevail regarding the conclusions to be drawn on the applicability of the principles and rules of humanitarian law in particular contexts.

(b) *Treaties declaring, creating, or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries*

(8) It is generally recognized that treaties declaring, creating, or regulating a permanent regime or status, or related permanent rights, are not suspended or terminated in case of an armed conflict. The types of agreements involved include cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, and the creation of exceptional rights of use of or access to the territory of a State.

(9) There is a certain amount of case law supporting the position that such agreements are unaffected by the incidence of armed conflict. Thus, in the *North Atlantic Coast Fisheries* arbitration the British Government contended that the fisheries rights of the United States, recognized by the Treaty of 1783, had been abrogated as a consequence of the war of 1812. The Court did not share this view and stated that: "International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it."[411]

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a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war." *Ibid.*

[408] Treaty of Friendship and Commerce concluded between Prussia and the United States on 10 September 1785, article 24, cited in H.W. Verzijl, *International Law in Historical Perspective*, Leyden, Sijthoff, 1973, p. 371.

[409] American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, para. 336 (e) (1987).

[410] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 226, at para. 89.

[411] *North Atlantic Coast Fisheries* case (Great Britain, United States), award of 7 September 1910, United Nations, *Reports of International Arbitral Awards* (*UNRIAA*), vol. XI, p. 167, at p. 181. See also C. Parry, *British Digest of International Law*, vol. 2B, 1967, pp. 585–605.

(10) Similarly, in the case of *Meyer's Estate* (1951), an appellate court in the United States of America, addressing the permanence of treaties dealing with territory, held that:

> "[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the Government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war ...".[412]

In *State ex rel. Miner v. Reardon* (1926), a California Court ruled that some treaties survive a state of war, such as boundary treaties.[413] This finding is, of course, connected with the prohibition against the annexation of occupied territory.

(11) The resort to this category does, however, generate certain problems. One of them is the fact that treaties of cession and other treaties affecting permanent territorial dispositions create permanent rights. And it is these rights which are permanent, not the treaties themselves. Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict.

(12) A further source of difficulty derives from the fact that the limits of this category remain to some extent uncertain. For example, in the case of treaties of guarantee, it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a lasting state of affairs, such as the permanent neutralization of a territory, will not be terminated by an armed conflict. Thus, as McNair notes:

> "the treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status".[414]

(13) A number of writers would include agreements relating to the grant of reciprocal rights to nationals and to acquisition of nationality within the category of treaties creating permanent rights or a permanent status. However, the considerations applying to the treatment of such agreements as not susceptible to termination are to be differentiated to a certain extent from those concerning treaties of cession of territory and boundaries. Accordingly, such agreements will be more appropriately associated with the wider class of friendship, commerce and navigation treaties and other agreements concerning private rights. This class of treaties is dealt with below.

(14) In their regulation of the law of treaties, the Commission and States have also accorded a certain recognition to the special status of boundary treaties.[415] Article 62 (2) (a) of the 1969 Vienna Convention provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary. Such treaties were recognized as an exception to the general rule of Article 62 because otherwise that rule, instead of serving the cause of peaceful change, might become a source of dangerous frictions.[416] The Vienna Convention on Succession of

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[412] *AILC* 1783–1968, vol. 19, p. 133, at p. 138.

[413] *Ibid.*, p. 117, at p. 119; see also *AD* 1919–1942, No. 132, at p. 238.

[414] McNair, *The Law of Treaties* (footnote 391 above), p. 703.

[415] On this issue, see equally the case *In re Meyer's Estate* mentioned in paragraph (10) above.

[416] Paragraph (11) of the Commission's commentary to draft article 59, now article 62, of the Vienna Convention (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, p. 79). The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority at the United Nations Conference on the Law of Treaties.

States in Respect of Treaties reaches a similar conclusion about the resilience of boundary treaties, providing in its article 11, that "[a] succession of States does not as such affect (a) a boundary established by a treaty, or (b) obligations and rights established by a treaty and relating to the regime of a boundary".[417] Although these examples are not directly relevant to the question of the effects of armed conflict on treaties, they nevertheless attest to the special status attached to these types of regimes.

(c) *Multilateral law-making treaties*

(15) Law-making treaties have been defined as follows:

> "(i) *Multi-partite law-making treaties*
>
> By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime, status, or system. It is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerent. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 for the Limitation of the Employment of Force for the Recovery of Contract Debts and the Peace Pact of Paris of 1928 are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgments, etc., would probably belong to the same category."[418]

(16) The term "law-making" is somewhat problematic[419] and may not lend itself to a clear definition. There is, however, a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements following the Second World War. It has been asserted that "Multilateral Conventions of the 'law making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended, and revived on the termination of hostilities, or receive even in wartime a partial application."[420]

(17) The position of the United States is described in a letter of 29 January 1948 from the Legal Adviser of the State Department, Ernest A. Gross:

> "With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realised that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a

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[417] Vienna Convention on Succession of States in Respect of Treaties, United Nations, *Treaty Series*, vol. 1946, p. 3.

[418] McNair, *The Law of Treaties* (footnote 391 above), p. 723.

[419] See Secretariat Memorandum (A/CN.4/550 and Corr.1), paras. 49–50.

[420] I.A. Shearer, *Starke's International Law*, 11th ed., London, Butterworths, 1994, p. 493.

> contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.
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> It is considered by this Government that, with the coming into force on 15 September 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ..."[421]

(18) The British position, as stated in a letter from the Foreign Office of 7 January 1948, was the following:

> "I am replying ... to your letter ... in which you enquired about the legal status of multilateral treaties of a technical or non-political nature, and whether these are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.
>
> You will observe that, in the peace treaties with Italy, Finland, Romania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to international law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the International Air Navigation Convention of 1919 and various postal and telegraphic conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions insofar as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.
>
> As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice."[422]

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[421] See R. Rank, "Modern War and the Validity of Treaties: A Comparative Study", *Cornell Law Quarterly*, vol. 38, 1952–1953, p. 321, at pp. 343–344.

[422] *Ibid.*, p. 346. See also Fitzmaurice, "The Juridical Clauses of the Peace Treaties", (footnote 399 above), pp. 308–309, and H. Lauterpacht (ed.), *Oppenheim's International Law*, vol. II (footnote 390 above), pp. 304–306. Fitzmaurice discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification, and notes:

"The merit of a provision of this kind is that it settles beyond possibility of doubt the position in regard to each bilateral treaty which was in force at the outbreak of war between the former enemy States and any of the Allied or Associated Powers, which would certainly not be the case in the absence of such a provision, having regard to the considerable difficulty and confusion which surrounds the subject of the effect of war on treaties, particularly bilateral treaties.

(19) The position of the German,[423] Italian,[424] and Swiss[425] Governments appears to be essentially similar with regard to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice and, especially more current practice, is needed.

(20) In this particular context the decisions of municipal courts must be regarded as a problematical source. In the first place, such courts may depend upon the guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival. In this connection, the decision of the Scottish Court of Session in *Masinimport v. Scottish Mechanical Light Industries Ltd.* (1976)[426] may be cited.

(21) Although the sources are not all congruent, the category of law-making treaties can be recommended for recognition as a class of treaties enjoying a status of survival. As a matter of principle they should qualify, and there is not an inconsiderable quantity of State practice favourable to the principle of survival.

(d) *Treaties on international criminal justice*

(22) By including "treaties on international criminal justice", the Commission chiefly intended to ensure the survival and continued operation of treaties such as the Rome Statute of the International Criminal Court of 17 July 1998.[427] The category in question may also encompass other general, regional and even bilateral agreements establishing international mechanisms for trying persons suspected of having perpetrated international crimes (crimes against humanity, genocide, war crimes, crime of aggression). The category covered here only extends to treaties establishing international mechanisms for the prosecution of persons suspected of such crimes, to the exclusion of those set up by other types of acts such as the Security Council resolutions relating to the International Criminal Tribunals for

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This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the peace treaties and to leave the matter to rest on the basic rules of international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the peace treaties."

[423] *Ibid.*, pp. 349–354.

[424] *Ibid.*, pp. 347 and 348.

[425] See *Répertoire suisse de droit international public*, pp. 186–191.

[426] *ILR*, vol. 74, p. 559, at p. 564.

[427] United Nations, *Treaty Series*, vol. 2187, p. 3.

the Former Yugoslavia and for Rwanda.[428] It also excludes mechanisms resulting from agreements between a State and an international organisation, because the present draft articles do not cover treaty relations involving international organizations.[429] Finally, the category described here only encompasses treaties setting up procedures for prosecution and trial in an international context and does not comprise agreements on issues of international criminal law generally.

(23) The prosecution of international crimes and the trial of those suspected of having committed them concerns the international community as a whole. This is in itself a reason for advocating the survival of the treaties belonging to this category. To this it will be added that the inclusion of war crimes renders essential the survival of the treaties considered here: war crimes can only occur in time of armed conflict, and aggression is an act resulting in international armed conflict. The two other main categories of international crimes, crimes against humanity and genocide, too, are often committed in the context of armed conflict.

(24) It may be, however, that certain provisions of an instrument belonging to this category of treaties cease to be operational as a result of armed conflict, for example those relating to the transfer of suspects to an international authority or obligations assumed by a State regarding the execution of sentences on their territory. The separability of such provisions and obligations from the rest of treaty pursuant to draft article 11 of the present draft articles would seem unproblematic.

(25) There remains the question of whether the insertion of this type of treaties is a matter of *lex ferenda* or *lex lata*. At first sight, the former would seem to hold true because the kind of conventions under consideration are of relatively recent origin, and very little practice — if any — can be produced, except of course for the fact that a treaty such as the Rome Statute was plainly intended to continue to operate in situations of international or non-international conflict. It should also be recalled that part of the treaty provisions under consideration are of a *jus cogens* character.

(e) *Treaties of friendship, commerce and navigation and agreements concerning private rights*

(26) Before analysing this type of treaties and their fate in some detail, a few preliminary observations are in order. First, it must be made clear that this category is not necessarily confined to classical "treaties of friendship, commerce and navigation (FCN)", but may include treaties of friendship, commerce and consular relations,[430] or treaties of establishment. Second, as a rule, only part of these instruments survive. It is evident, in particular, that provisions relating to "friendship" are unlikely to survive to an armed conflict opposing the Contracting States; but that does not mean that provisions relating to

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[428] International Tribunal for the Former Yugoslavia, established by SC Res. 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993; and International Tribunal for Rwanda, established by SC Res. 955 (1994) of 8 November 1994.

[429] See Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, of 6 June 2003; United Nations, *Treaty Series*, vol. 2329, p. 117; Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, of 22 January and 6 February 2007, *ibid.*, vol. 2461, p. 257, and SC Res. 1757 (2007) of 30 May 2007; and Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, of 16 January 2002, United Nations, *Treaty Series*, vol. 2178, p. 137.

[430] *Brownell v. City and County of San Francisco*, California Court of Appeal, 1st District, 21 June 1954, *ILR* 1954, p. 438.

the status of foreign individuals do not continue to apply, that is, provisions regarding their "private rights".[431] Third, while treaties of commerce tend to lapse as a result of armed conflicts between States,[432] such treaties may contain provisions securing the private rights of foreign individuals which may survive as a result of the separability of treaty provisions under article 11 of the present draft articles. Fourth, the term "private rights" requires explanations: Is it limited to individuals' substantive rights or does it also encompass procedural ones?

(27) Regarding treaties of FCN, reference has to be made, in the first place, to the Jay Treaty, or Peace Treaty, or Treaty of FCN, concluded on 19 November 1794 between the United States of America and Great Britain. Some provisions of this Treaty have remained applicable to this day, surviving, in particular, the War of 1812 between the two countries.

(28) In what is perhaps the leading case in the matter — *Karnuth v. United States* (1929) — the provision in issue was article III of the Jay Treaty, which gives the subjects of one Contracting Party free access to the territory of the other. While it held that the Article in question had been abrogated by the 1812 War, the Supreme Court reiterated what it had said in the earlier case of *Society for the Propagation of the Gospel v. Town of New Haven* (1823):

> "[t]reaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.[433]

(29) Article III of the Treaty also exempts from customs duties the members of the Five Indian Nations established on the one or the other side of the border. In two cases, United States courts ruled that provisions of the Treaty bearing on the rights or obligations, not of the Contracting Parties as such, but of "third parties", *i.e.* individuals, had survived armed conflicts.[434]

(30) Article IX of the Jay Treaty provided that subjects of either country may continue to hold land on the territory of the other. In *Sutton v. Sutton*, a very early case brought before the British Court of Chancery, the Master of the Rolls held that since the relevant treaty provision stated that subjects of one Party were entitled to keep property on the territory of the other, as were their heirs and assignees, it was reasonable to infer that the Parties intended the operation of the Treaty to be permanent, and not to depend upon the continuance of a state of peace. This was borne out, the Master of the Rolls added, by the "true construction" to be given to the act of implementation on the domestic level.[435]

(31) It is now convenient to turn to a number of precedents dealing with treaties which do not bear the "FCN" label. The object of the case *Ex parte Zenzo Arakawa* (1947) was article I of the Treaty of Commerce and Navigation concluded between the United States and Japan on 21 February 1912, which provided for the constant protection and security of the citizens of each Party on the territory of the other. According to the judge, "[s]ome

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[431] In this sense, individuals are considered to be "third parties", see below, para. 30.

[432] See two cases reported in *Fontes juris gentium*, Series A, Sec. 2, t. 1, p. 163, No. 342, and t. 6, p. 371, No. 78; the *Russian German Commercial Treaty* case, German *Reichsgericht*, 23 May 1925, *AD* 1925–1926, No. 331.

[433] *AILC 1783–1968*, vol. 19, p. 49, at p. 54.

[434] *United States ex rel. Goodwin v. Karnuth*, District Court for the Western District of New York, 28 November 1947, *AD* 1947, No. 11; *McCandless v. United States*, Circuit Court of Appeals, 3rd Circuit, 9 March 1928, *AD* 1927–1928, No. 363.

[435] Court of Chancery, 29 July 1830, *BILC*, vol. 4, p. 362, at pp. 367–368.

[treaties] are unaffected by war, some are merely suspended, while others are totally abrogated". Treaties of commerce and navigation fall into the second or third category, "because the carrying out of their terms would be incompatible with the existence of a state of war". The *Arakawa* case may be a special one, however, conditioned as it was by the peculiarities of the armed conflict between the two countries and perhaps also by the dimension of the protection granted by the relevant treaty provision.[436]

(32) *Techt v. Hughes* was another landmark in the progression of the case law. The issue considered was the survival of the Treaty of Commerce and Navigation between the United States and Hungary of 27 August 1829, more precisely its provision on the tenure of land. Judge Cardozo pointed out that it was difficult to see why, while in *Society for the Propagation of the Gospel v. Town of New Haven*[437] a provision on the *acquisition* of real property was found to have survived the War of 1812, this should be disallowed when it came to the *enjoyment* of such property.[438]

(33) *State ex rel. Miner v. Reardon* pertained to article 14 of the 1828 Treaty between the United States and Prussia. A provision of that Treaty dealt with the protection of the property of individuals, in particular the right to inherit property. The lower court opted for the survival of this provision,[439] as did the Supreme Court of Nebraska in a decision of 10 January 1929,[440] and the United States Supreme Court in its decision in *Clark v. Allen* (1947), where Article 4 of the Treaty of Friendship, Commerce and Consular Rights between Germany and the United States, of 8 December 1923, was under scrutiny. That provision allowed nationals of either State to succeed to nationals of the other. Following established precedent, the Court stated that "the outbreak of war does not necessarily suspend or abrogate treaty provisions" — note the reference to "treaty *provisions*" rather than to "treaties" — though such a provision may of course be incompatible with the existence of a state of war (*Karnuth* case, paragraph 28), or the President or the Congress may have formulated a policy inconsistent with the enforcement of all or part of the treaty (*Techt* case, paragraph 32). The Court then followed the decision in *Techt* (para. 32), where a similar treaty provision was held to have survived. Indeed, the question to be answered was whether the provision in issue was "incompatible with national policy in time of war". The Court found that it was not.[441]

(34) Another group of cases begins with two French decisions. *Bussi v. Menetti* was about a proprietor in Avignon who, for health reasons, wished to live in a house owned by him and gave notice to his Italian tenant. The Tribunal of first instance accepted his plea, considering that the outbreak of the war between France and Italy in 1940 had ended the Treaty of Establishment concluded between the two countries on 3 June 1930, according to which French and Italian nationals enjoyed equal rights in tenancy matters. The *Cour de cassation* (*Chambre civile*) ruled that treaties were not necessarily suspended by the existence of a war. In particular, the Court said:

> "treaties of a purely private law nature, which do not involve any intercourse between the enemy Parties and which have no connection with the conduct of

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[436] District Court, Eastern District of Pennsylvania, *AILC 1783–1968*, vol. 19, p. 84.

[437] United States Supreme Court, 1823, *AILC 1783–1968*, vol. 19, p. 41, especially at p. 48.

[438] *AILC 1783–1968*, vol. 19, p. 95.

[439] *Ibid.*, p. 117, at p. 122.

[440] *Goos v. Brocks*, Supreme Court of Nebraska, 10 January 1929, *AD* 1929–1930, No. 279.

[441] *AILC 1783–1968*, vol. 19, p. 70, at pp. 73, 74 *et seq.*, 78–79. See also *Blank v. Clark*, District Court, Eastern District of Pennsylvania, 12 August 1948, *AD* 1948, No. 143.

hostilities — such as conventions relating to leases — are not suspended merely by the outbreak of war".[442]

(35) The case of *Rosso v. Marro* was a similar one, except that the claim was one of damages for the refusal to renew a lease, allegedly in violation of a 1932 convention. On this issue, the *Tribunal civil* of Grasse explained the following:

> "Treaties concluded between States who subsequently become belligerents are not necessarily suspended by war. In particular, the conduct of the war [must allow for] the economic life and commercial activities to continue in the common interest. [Hence] the Court of Cassation, reverting … to the doctrine which it has laid down during the past century (…), now holds that treaties of a purely private law nature, not involving any intercourse between the belligerent Powers, and having no connection with the conduct of hostilities, are not suspended in their operation, merely by the existence of a state of war."[443]

(36) The above case law is, however, contradicted by *Lovera v. Rinaldi*. In that case, the Plenary Assembly of the *Cour de cassation*, again having to deal with the status of the Treaty of Establishment of 3 June 1930, which prescribed national or at least most-favoured-nation treatment, found that the Convention had lapsed at the onset of war, because the maintenance of its obligations was judged incompatible with the state of war.[444] In *Artel v. Seymand*, the *Cour de cassation* (*Chambre civile*) also concluded that that same Convention had lapsed so far as leases were concerned.[445]

(37) In relation to the Convention of 3 June 1930 between France and Italy, the *Cour de cassation* held, in 1953, that the national treatment to be granted to Italians under the Convention regarding the tenure of agricultural land was incompatible with a state of war.[446]

(38) This series will be closed by a somewhat peculiar case which concerns individuals but makes a foray into the field of public law. Article 13 of a Convention concluded between France and Italy on 28 September 1896 and providing that persons residing in Tunis and having retained Italian citizenship would continue to be considered Italians, was considered operative in 1950 despite World War II.[447]

(39) There are a large number of cases which concern procedural rights secured by multilateral treaties. Many of them relate to security for costs (*cautio judicatum solvi*). This was true for the case of *CAMAT v. Scagni*, the object of which was article 17 of the 1905 Hague Convention on Civil Procedure. According to the French court involved,[448] private-law treaties should, in principle, survive but cannot be invoked by aliens whose hostile attitude may have affected the evolution of the war, especially, as was the case here, by persons who had been expelled from France on account of their attitude.[449] In another case dealt with by a Dutch court after World War II, it was held that the relevant provision of the 1905 Hague Convention had not lapsed as a result of the War. By contrast, another Dutch court reached the conclusion that the 1905 Convention had been suspended at the outbreak of the War and had re-entered into force on the basis of the 1947 Treaty of Peace with

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[442] 5 November 1943, *AD* 1943–1945, No. 103, at pp. 304–305.

[443] 18 January 1945, *AD* 1943–1945, No. 104, at p. 307.

[444] Decision of 22 June 1949, *AD* 1949, No. 130.

[445] Decision of 10 February 1948, *AD* 1948, No. 133.

[446] *Gambino v. Consorts Arcens*, Cour de cassation, 11 March 1953, *ILR* 1953, p. 599.

[447] *In re Barrabini*, Court of Appeal of Paris, 28 July 1950, *ILR* 1951, No. 156.

[448] Court of Appeal of Agen (France).

[449] 19 November 1946, *AD* 1946, No. 99.

Italy.[450] The same conclusion was reached by the *Landgericht* of Mannheim (Germany) and by another Dutch court.[451] In one case the question of the survival of the 1905 Convention was left open.[452]

(40) Certain cases relate to the survival of other multilateral treaties, such as the Hague Convention on Divorce and Judicial Separation of 1902, which was held to have been suspended during World War II and reactivated at the end of that conflict.[453]

(41) Mention has to be made as well of the 1905 Hague Convention on the Conflict of Laws in Matters of Marriage, article 4 of which prescribed a certificate of capacity to marry. This requirement was objected to by a husband-to-be who contended that, as a result of the War, the Convention had lapsed. The Netherlands Court of Cassation disagreed, explaining that "[t]here could only be a question of suspension in so far and for so long as the provisions of the Convention should have become untenable", which was not the case here and which suggests that the issue was considered to be one of temporary impossibility of performance rather than one of the effects of armed conflict of treaties.[454]

(42) One also notes with interest a decision in which the Court of Appeal of Aix (France) upheld the continued validity of the ILO Convention of 10 June 1925 providing for equal treatment of nationals of one Contracting Party by the other Party in matters of workmen's' compensation. The Court found that the Convention had not lapsed *ipso facto*, without denunciation, upon the outbreak of a war and that, at the most, the exercise of rights deriving from the Convention was suspended[455] – an unsatisfactory conclusion because it appears to say, on the one hand, that the Convention remained applicable while, on the other, it speaks of suspension, which suggests exactly the contrary.

(43) Mention must equally be made of a series of Italian cases dealing with multilateral and bilateral conventions on the execution of judgments. In some of these cases, survival was assumed,[456] in others not.[457]

(44) As a matter of principle and sound policy, the principle of survival would seem to extend to obligations arising under multilateral conventions concerning arbitration and the enforcement of awards. In *Masinimport v. Scottish Mechanical Light Industries Ltd.*, the Scottish Court of Session held that such treaties had survived World War II and were not covered by the 1947 Peace Treaty with Romania. The agreements concerned were the Protocol on Arbitration Clauses of 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. The Court characterized the instruments as "multipartite law-making treaties".[458] In 1971 the Italian Court of Cassation (Joint Session) held that the 1923 Protocol on Arbitration Clauses had not been terminated

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[450] *Gevato v. Deutsche Bank*, District Court of Rotterdam, 18 January 1952, *ILR* 1952, No. 13.

[451] *Security Cost* case, 26 July 1950, *AD* 1949, No. 133; *Herzum v. van den Borst*, District Court of Roermond, 17 February 1955, *ILR* 1955, p. 900.

[452] *Legal Aid* case, 24 September 1949, Celle Court of Appeal, *AD* 1949, No. 132.

[453] *Silverio v. Delli Zotti*, Luxembourg, High Court of Justice, 30 January 1952, *ILR* 1952, No. 118.

[454] *In re Utermöhlen*, 2 April 1948, *AD* 1949, No. 129, at p. 381.

[455] *Ets Cornet v. Vve Gaido*, 7 May 1951, *ILR* 1951, No. 155.

[456] *P.M. v. Miclich*, Court of cassation, 3 September 1965, *Diritto internazionale*, vol. XXI-II, 1967, p. 122.

[457] *LSZ v. MC*, Rome Court of Appeal, 22 April 1963, *Diritto internazionale*, vol. XIX-II, 1965, p. 57. In some cases, the decision was made dependent on whether the relevant treaties had been put back in operation: Court of Cassation, 9 May 1962, *Rigano v. Società Johann Meyer*, *ibid.*, vol. XVIII-II, 1964, p. 181; Milan, Court of Appeal, 19 May 1964, *Shapiro v. Flli Viscardi*, *Rivista di diritto internazionale*, vol. XLIII, 1965, p. 286.

[458] 30 January 1976, *ILR*, vol. 74, p. 559.

despite the Italian declaration of war on France, its operation having only been suspended pending cessation of the state of war. This is, again, an unsatisfactory conclusion, for the reasons indicated in paragraph (42) (*Cornet* case).

(45) The recognition of this group of treaties would seem to be justified, and there are also links with other classes of agreements, including multilateral law-making treaties.

(46) The preceding description and analysis lead to the conclusion that, even though the case law examined may not be entirely coherent, there is a clear trend toward holding that "private rights" protected by treaties subsist, even where procedural rights of individuals are concerned.

(f) *Treaties for the international protection of human rights*

(47) Writers make very few references to the status, for present purposes, of treaties on the international protection of human rights. This state of affairs is easily explained. Much of the relevant writings on the effect of armed conflicts on treaties preceded the conclusion of international human rights treaties. Furthermore, the specialist literature on human rights has a tendency to neglect technical problems. Article 4 of the 1985 resolution of the Institute of International Law provides, however:

> "The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides."

Article 4 was adopted by 36 votes to none, with 2 abstentions.[459]

(48) The use of the category of human rights protection may be viewed as a natural extension of the status accorded to treaties of FCN and analogous agreements concerning private rights, including bilateral investment treaties. There is also a close relation to the treaties creating a territorial regime and, in so doing, setting up standards governing the human rights of the population as a whole, or a regime for minorities, or a regime for local autonomy.

(49) The application of international human rights treaties in time of armed conflict is described as follows:

> "Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply during armed conflict. First, the International Court of Justice stated in its *Nuclear Weapons* Advisory Opinion that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. The *Nuclear Weapons* opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts that although the inherent right to self-defence may justify non-performance of certain treaties, 'as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct'. Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict.[460]

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[459] *Annuaire de l'Institut de droit international*, vol. 61-II, pp. 219–221.

[460] Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 32 (footnotes omitted).

(50) This description illustrates the problems relating to the applicability of human rights standards in the event of armed conflict.[461] The task of the Commission has not been to deal with such matters of substance but to direct attention to the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate because derogability concerns the operation of the treaty provisions and is not related to the issue of continuation or termination. However, the competence to derogate "in time of war or other public emergency threatening the life of the nation" certainly provides evidence that an armed conflict as such may not result in suspension or termination. At the end of the day the appropriate criteria are those laid down in draft article 4. The exercise of a competence to derogate by one Party to the treaty would not prevent another Party from asserting that a suspension or termination was justified on other grounds.

(51) It will finally be remembered that, under article 11 of the present draft articles, certain provisions of international treaties for the protection of human rights may not be terminated or suspended. This does not mean that the same is true for the other provisions if the requirements of article 11 are met. Conversely, there may be human rights provisions in treaties belonging to other categories of treaties which may continue in operation even if those treaties do not, or only do partly, survive, always supposing that the separability tests of article 11 are fulfilled.

(g) *Treaties relating to the international protection of the environment*

(52) Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the international protection of the environment are extremely varied.[462]

(53) The pleadings relating to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.[463]

(54) In the *Nuclear Weapons* Advisory Opinion the International Court formulated the general legal position in these terms:

> "29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
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> 30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

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[461] See, further, Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge, Cambridge University Press, 2002, pp. 247–276.

[462] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge, Cambridge University Press, 2003, pp. 307–316; Patricia Birnie and Alan Boyle, *International Law and the Environment*, 3rd ed., Oxford, Oxford University Press, 2009, pp. 205–208; K. Mollard-Bannelier, *La protection de l'environnement en temps de conflit armé*, Paris, Pedone, 2001.

[463] See the Secretariat Memorandum (A/CN.4/550 and Corr.1), paras. 58–63.

> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.
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> This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:
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>> 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'
>
> 31. The Court notes furthermore that articles 35, paragraph 3, and 55 of Additional Protocol I [to the Geneva Conventions of 1949] provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.
>
> These are powerful constraints for all the States having subscribed to these provisions."[464]

(55) These observations are, of course, significant. They provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict, despite the fact that, as indicated in the written submissions relating to the Advisory Opinion proceedings, there was no general agreement on the specific legal question.[465]

(h) *Treaties relating to international watercourses and related installations and facilities*

(56) Treaties relating to watercourses or rights of navigation are essentially a subset of the category of treaties creating or regulating permanent rights or a permanent regime or status. It is, nonetheless, convenient to examine them separately.

(57) The picture is, however, far from simple. The practice of States has been described as follows by Fitzmaurice:

> "Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives on the restoration of peace."[466]

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[464] Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 226, at paras. 29–31.

[465] See D. Akande, "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court", *BYBIL*, vol. 68, 1997, pp. 183 and 184.

[466] Fitzmaurice, "The Judicial Clauses of Peace Treaties" (footnote 399 above), p. 316.

(58) The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.[467]

(59) In any event, the regime of individual straits and canals is usually dealt with by specific treaty provisions. Examples of such treaties include the Convention Respecting the Free Navigation of the Suez Maritime Canal (Constantinople) (1888),[468] the Convention Instituting the Statute of Navigation of the Elbe (1922),[469] the Treaty of Versailles as it relates to the Kiel Canal (1919),[470] the Convention Regarding the Regime of the Straits (Montreux) (1936),[471] the Panama Canal Treaty (1977)[472] and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (1977).[473]

(60) Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus article 15 of the Statute on the Regime of Navigable Waterways of International Concern (1922)[474] provides that:

> "This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

(61) The Convention on the Law of the Non-navigational Uses of International Watercourses (1997)[475] prescribes in its article 29:

> "*International watercourses and installations in time of armed conflict*
>
> International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

(62) There is accordingly a case for including the present category in the indicative list.

(i) *Treaties relating to aquifers and related installations and facilities*

(63) Similar considerations would seem to apply with respect to treaties relating to aquifers and related installations and facilities. Groundwater constitutes about 97 per cent of the world's fresh water resources. Some of it forms part of surface water systems governed by the Convention of 1997 on the Law of the Non-navigational Uses of International Watercourses mentioned in paragraph (61) and, accordingly, will fall under that instrument. On the groundwaters not subject to that Convention, there is very little State practice. In its work on the law of transboundary aquifers, the Commission has demonstrated what is achievable in this area.[476] In addition, the existing body of bilateral,

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[467] See R.R. Baxter, *The Law of International Waterways, with Particular Regard to Interoceanic Canals*, Cambridge, Mass., Harvard University Press, 1964, p. 205.

[468] *American Journal of International Law*, Supplement No. 3, p.123.

[469] League of Nations, *Treaty Series*, vol. 26, pp. 221, 241.

[470] *British and Foreign State Papers*, vol. 112 (1919).

[471] League of Nations *Treaty Series*, vol. 173, p. 213.

[472] *ILM*, vol. 36, 1977, p. 1022.

[473] *Ibid*., p. 1040.

[474] League of Nations *Treaty Series*, vol. 7, p. 37, at p. 61.

[475] G.A. Res. 51/229 of 21 May 1997, Annex.

[476] Draft articles on the law of transboundary aquifers, Report of the International Law Commission, Sixtieth Session, *Official Records of the General Assembly, Supplement No. 10* (A/63/10), para. 53. See G.A. res. 63/124 of 11 December 2008, annex.

regional and international agreements and arrangements on groundwaters is becoming noteworthy.[477]

(64) Based on the fact that the Commission's draft articles on aquifers largely follow provisions of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, and also on the underlying protection provided for by the law of armed conflict, the basic assumption is that transboundary aquifers or aquifer systems and related installations, facilities and other works enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and are not to be used in violation of those principles and rules.[478]

(65) Although the law of armed conflict itself provides protection, it may not be so clear that there is a necessary implication from the subject matter of treaties relating to aquifers and related installations and facilities that no effect ensues from an armed conflict. But the vulnerability of aquifers and the need to protect the waters contained therein make a compelling case for drawing the necessary implication of continuance.

(j) *Treaties which are constituent instruments of international organizations*

(66) Most international organizations have been established by treaty,[479] commonly referred to as the "constituent instrument" of the organization. As a general rule, international organizations established by treaties enjoy, under international law, a legal personality separate from that of its members.[480] The legal position, therefore, is analogous to that of the establishment of a permanent regime by means of a treaty. The considerations applicable to permanent regimes, discussed in paragraphs (8) to (14), accordingly also apply generally to constituent instruments of international organizations. As a general proposition, such instruments are not affected by the existence of an armed conflict in the three scenarios envisaged in article 3.[481] In the modern era, there is scant evidence of practice to the contrary. This is particularly the case with international organizations of a universal or regional character whose mandates include the peaceful settlement of disputes.

(67) This general proposition is without prejudice to the applicability of the rules of an international organization, which include its constituent instrument,[482] to ancillary questions such as the continued participation of its members in the activities of the international organization, the suspension of such activities in light of the existence of an armed conflict and even the question of the dissolution of the organization.

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[477] See generally S. Burchi/K. Mechlem, *Groundwater in International Law. Compilation of Treaties and Other Legal Instruments*, (FAO/UNESCO), 2005.

[478] See article 18 of the draft articles on the law of transboundary aquifers.

[479] See para. (4) of the commentary to Article 2 of the draft articles on the responsibility of international organizations, *supra*, Chapter V, sect. E2.

[480] *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 185; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 73, para. 37 ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties)"; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996*, p. 66, para. 25.

[481] See the 1985 resolution of the Institute of International Law, Article 6 ("A treaty establishing an international organization is not affected by the existence of an armed conflict between any of its parties"), *Annuaire de l'Institut de droit international*, vol. 61-II, pp. 199–255.

[482] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975, article 1 (34).

(k) *Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement*

(68) This category is not prominent in the literature and there is to some extent an overlap with the category of multilateral treaties constituting an international regime. Certain writers, however, give explicit recognition to the continuing operation of treaties establishing mechanisms for the peaceful settlement of international disputes.[483] In accordance with this principle, special agreements concluded before World War I were applied to the arbitrations concerned after the War.

(69) The treaties falling into this category relate to conventional instruments on international settlement procedures, that is, on procedures between subjects of international law. That category does not extend, *per se*, to mechanisms for the protection of human rights, which are, however, covered by subparagraph (f) (treaties for the international protection of human rights). Similarly, it does not include treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad which may, however, come within group (e) as "agreements concerning private rights".

(70) The survival of this type of agreement is also favoured by article 9 of the draft articles (notification of intention to terminate, or to withdraw from, a treaty, or to suspend its operation), which envisages the preservation of the rights or obligations of States regarding dispute settlement (see paragraph (7) of the commentary to article 9).

(l) *Treaties relating to diplomatic and consular relations*

(71) Also included in the indicative list are treaties relating to diplomatic relations. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any event the provisions of the Vienna Convention on Diplomatic Relations suggest its application in time of armed conflict. Indeed, Article 24 of that Convention provides that the archives and documents of the mission shall be inviolable "at any time"; this phrase was added during the Vienna Conference in order to make clear that inviolability continued in the event of armed conflict.[484] Other provisions, for example Article 44 on facilities for departure, include the words "even in case of armed conflict". Article 45 is of particular interest as it provides:

> "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> "(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
>
> "(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
>
> "(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State."

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[483] See S.H. McIntyre, *Legal Effect of World War II on Treaties of the United States*, The Hague, Martinus Nijhoff, 1958, pp. 74–86; and McNair, *The Law of Treaties* (footnote 391 above), p. 720. See also M.O. Hudson, *The Permanent Court of International Justice, 1920–1942*, New York, Macmillan, 1943.

[484] See Eileen Denza, *Diplomatic Law, A Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed., Oxford, Oxford University Press, 2008, p. 189.

(72) The principle of survival is recognized by some commentators.[485] The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the International Court of Justice in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. In the words of the Court:

> "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of articles 44 and 45 of the Convention of 1961. (Cf. also articles 26 and 27 of the Convention of 1963.) Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State."[486]

(73) The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event, the Court made it reasonably clear that the applicable law included "the applicable rules of general international law" and that the Convention was a codification of the law.[487]

(74) As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations, there is a strong case for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of severance of diplomatic relations or of armed conflict.[488] The provisions of the 1963 Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus, Article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted "even in case of armed conflict". Article 27 provides that the receiving State shall, "even in case of armed conflict", respect and protect the consular premises. The principle of survival is recognized by Chinkin.[489]

(75) The International Court of Justice, in its judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, emphasized the special character of the two Vienna Conventions of 1961 and 1963 (see paragraph 72).

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[485] See for example C.C. Chinkin, , "Crisis and the Performance of International Agreements: The Outbreak of War in Perspective", *Yale Journal of World Public Order*, vol. 7, 1981–1982, p. 177, at pp. 194–195; and Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 36.

[486] *I.C.J. Reports 1980*, p. 3, para. 86.

[487] *Ibid.*, para. 45, para. 90 and (in the *dispositif*) para. 95.

[488] Luke T. Lee, *Consular Law*, 2nd ed., Oxford, Clarendon Press, 1991, p. 111.

[489] C. Chinkin, (footnote 485 above), pp. 194 and 195. See also the Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 36.

(76) The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included "the applicable rules of general international law".[490]

(77) Regarding national practice, a decision of the California Court of Appeal (1st District) may be of interest. The Treaty of Friendship, Commerce and Consular Rights between the United States and Germany of 8 December 1923 exempted from taxation land and buildings used by each State on the territory of the other. Taxes were levied, however, when Switzerland, as a caretaker, and, later on, the federal Government took over the premises of the German Consulate General in San Francisco. The City and County of San Francisco contended that the 1923 Treaty had lapsed or been suspended as a result of the outbreak of World War II. But the Court of Appeal found that the Treaty and the exemption provided by it were not abrogated "since the immunity from taxation therein provided was not incompatible with the existence of a state of war". While this case may be viewed as an affirmation of the continued applicability of a treaty of friendship and commerce, the 1923 Treaty also concerned consular relations and hence may serve as evidence of the survival of agreements on consular relations.[491]

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[490] *I.C.J. Reports 1980*, p. 3, para. 45; para. 90, and (in the *dispositif*), para. 95.

[491] *Brownell v. City and County of San Francisco*, 21 June 1954, *ILR* 1954, p. 432, especially p. 433.

Chapter VII
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

102. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[492] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[493]

103. At its sixtieth session (2008), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/601). The Commission had also before it a memorandum by the Secretariat on the topic (A/CN.4/596 and Corr.1). The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[494]

B. Consideration of the topic at the present session

104. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/631). The Commission considered the report at its 3086th, 3087th and 3088th meetings, on 10, 12 and 13 May, and at its 3111th and 3115th meetings, on 25 and 29 July 2011.

105. The Commission also had before it the third report of the Special Rapporteur (A/CN.4/646). The Commission considered the report at its 3111th, 3113th, 3114th and 3115th meetings, on 25, 27, 28 and 29 July 2011.

1. Introduction by the Special Rapporteur of his second report

106. The second report — a continuation of aspects raised in the preliminary report[495] — reviews and presents a detailed overview of the issues concerning the scope of immunity of a State official from foreign criminal jurisdiction, including questions relating to immunity *ratione personae* and *ratione materiae*, and the territorial scope of immunity; further discusses what criminal procedural measures may be implemented against an official of a foreign State and what measures would violate that official's immunity, in particular, reviewing the various phases in a criminal proceeding, including the investigatory phase; addresses whether there are any exceptions to immunity, including examining the various

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[492] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph [illegible] of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[493] *Ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

[494] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth session, Supplement No. 10* (A/65/10), para. 343.

[495] A/CN.4/601.

rationales for such possible exceptions; and draws a number of conclusions relating to the various issues raised in the report.[496]

107. The Special Rapporteur noted that since the Commission began its consideration of the topic, the question of immunity of a State official had continued to be considered, both in practice, as new judicial decisions were rendered, and in academia. Attention was drawn, in particular, to the Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, adopted by the Institute of International Law in 2009,[497] as well as to some judicial decisions.[498] While acknowledging the ongoing debate and the diverse opinions that exist in relation to the topic, the Special Rapporteur emphasized the importance of looking at the actual state of affairs as the starting point for the Commission's consideration of the topic and explained that it was from the perspective of the *lex lata*, that he had proceeded to prepare his report.

108. In the opinion of the Special Rapporteur, immunity of a State official from foreign criminal jurisdiction was the norm and any exceptions thereto would need to be proven. He observed that State officials enjoy immunity *ratione materiae* in respect of acts performed in an official capacity since these acts are considered acts of the State, and these included unlawful acts and acts *ultra vires*. He pointed out that these acts are attributed both to the State and to the official and suggested that the criterion for attribution of the responsibility of the State for a wrongful act also determined whether an official enjoys immunity *ratione materiae* and the scope of such immunity, there being no objective reasons to draw a distinction in that regard. It was precisely by using the same criterion of attribution for the purpose of State responsibility and of immunity of State officials *ratione materiae*, that the responsibility of the State, as well as individual criminal responsibility would be engaged for the same conduct. The scope of the immunity of a State and the scope of the immunity of its official were nevertheless not identical, despite the fact that in essence the immunity was one and the same.

109. With regard to former State officials, the Special Rapporteur stated that these persons continue to enjoy immunity *ratione materiae* with respect to acts undertaken by them in an official capacity during their term in office but did not extend to acts which were performed by an official prior to his taking up office and after leaving it. Such immunity was therefore of a limited nature.

110. Concerning immunity *ratione personae*, which is enjoyed by the so-called troika, namely incumbent heads of State and Government and ministers for foreign affairs, and possibly by certain other incumbent high-ranking officials, the Special Rapporteur considered such immunity to be absolute and to cover acts performed in an official and a personal capacity, both while in office and prior thereto. In light of the link between the immunity and the particular post, immunity *ratione personae* was temporary in character and ceased upon the expiration of their term in office; such former officials nevertheless continued to enjoy immunity *ratione materiae*.

111. On the question of which acts of a State exercising criminal jurisdiction would violate the immunity of an official and what criminal procedure measures would be permissible, reference was made to the *Arrest Warrant* case[499] and the case concerning

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[496] A/CN.4/631, para. 94.

[497] Napoli session – 2009.

[498] For example, United States Supreme Court, *Samantar v. Yosuf* (No. 08-1555) 552 F. 3d 371; and Westminster Magistrates Court, United Kingdom, Decision concerning the request for an arrest warrant for Mikhail Gorbachev.

[499] *Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

Certain Questions of Mutual Assistance,[500] in which the International Court of Justice developed some criteria for deciding such issues. The Special Rapporteur agreed with the Court and pointed out that only such criminal procedure measures as were restrictive in character and would prevent a foreign official from discharging his functions by imposing a legal obligation on that person may not be taken.

112. Concerning the territorial scope of immunity, the Special Rapporteur considered that immunity takes effect from the moment the criminal procedure measure imposing an obligation on the foreign official is taken, irrespective of whether the official is abroad or not.

113. Turning to the issue of possible exceptions to immunity of a State official from foreign criminal jurisdiction, the Special Rapporteur observed that in the case of immunity *ratione personae*, the predominant view seemed to be that such immunity was absolute and that no exceptions thereto could be considered. In his opinion, the question of exceptions would thus only be pertinent with regard to immunity *ratione materiae* in the context of crimes under international law. Nevertheless, after having analysed the various rationales put forward in the doctrine and in certain judicial decisions justifying such exceptions (which were in one way or another, interrelated, namely (a) grave criminal acts cannot be official acts; (b) immunity is inapplicable since the act is attributed both to the State and the official; (c) *jus cogens* prevails over immunity; (d) a customary international law norm has emerged barring immunity; (e) universal jurisdiction; and (f) the concept of *aut dedere aut judicare*),[501] the Special Rapporteur remained unconvinced as to their legal soundness. He further expressed doubt that any justification for exceptions could be considered having emerged as a norm under international law. Upon careful scrutiny, none of the cases referred to by various advocates for exceptions to immunity gave evidence against immunity.[502] At the same time, attention was also drawn to certain cases in which the immunity had been upheld. In this context, the *Belhas v. Moshe Ya'alon* decision could be considered significant in that it upheld the proposition that under customary international law, immunity *ratione materiae* covers acts performed by every official in the exercise of his functions and that a violation of a *jus cogens* norm did not necessarily remove immunity.[503]

114. While the Special Rapporteur acknowledged the widely held opinion that the issue of exceptions to immunity fell within the sphere of progressive development of international law, he wondered to what extent those exceptions should apply. In his view, the issue raised serious concerns, including in relation to politically motivated prosecutions, trials *in absentia* and evidentiary problems as a result of the lack of cooperation of the State concerned. He cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law. The Commission would have an important role in harmonizing the application of immunities in national jurisdictions, which would serve to avoid any dubious practice involving disregard of

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[500] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177.

[501] A/CN.4/631, para. 56.

[502] *Ibid.*, paras. 69–70.

[503] United States District Court for the District of Columbia, *Ali Saadallah Belhas et al., Appellants v. Moshe Ya'alon, former Head of Army Intelligence Israel, Appellee,* 14 December 2006, 466 F. Supp. 2d 127; and Court of Appeals for the District of Columbia Circuit, *Belhas et al., Appellants v. Moshe Ya'alon,* 15 February 2008, 515 F.3d 1279. Reference was also made to the decisions by the German and French authorities between 2005 and 2008 concerning the request for the opening of criminal procedures against the former US Secretary of Defence, Donald Rumsfeld. In both cases, immunity was upheld.

immunity. The Special Rapporteur also drew attention to the fact that not all rationales for exceptions to immunity had been analysed in the second report. Reference was made in particular to the question of refusal to recognize immunity as counter-measure in response to a breach of an international obligation by the State of the official facing criminal charges.

115. Finally, the Special Rapporteur also recommended that the question relating to immunity of military personnel in armed conflict should not be considered under this topic since it was covered by a special legal regime.

2. Summary of the debate on the Special Rapporteur's second report

(a) General comments

116. The Special Rapporteur was commended for the thoroughness of his report, which was considered clear and well structured, and for the wealth of relevant material it contained, while the point was made that the Special Rapporteur could also have had recourse to other available material and doctrinal sources.

117. Members dwelt at length on the *general orientation of the topic*, acknowledging in particular its obvious political ramifications, as well as its impact on international relations. Recognizing that the topic was difficult and challenging, it was pointed out that it was imperative to agree on matters of principle and on the direction of the topic before the Commission could meaningfully proceed further in the discussion. Some members agreed broadly with the reasoning and conclusions of the report. While some other members welcomed the inclusion in the report of competing arguments voiced in relation to the topic, they also expressed concern that the report presented certain biased conclusions, failing to take into consideration developing trends in international law concerning, in particular, the question of grave crimes under international law. The very premise on which the topic had been analysed — from the concept of absolute sovereignty — was questioned, noting that the report raised fundamental preliminary questions on the substance. It was observed that this conception of the law had evolved, particularly in the aftermath of the Second World War, and that the consequences thereof could not remain static. Moreover, while it could hardly be disputed that principles of sovereign equality and non-interference were important in the conduct of international relations, the content of the rights and obligations deriving from such principles take into account the changes that occur on the international level and the different perspectives attached by the international community to the content of such rights and obligations. Whereas the notion that immunity over official acts belonged to the State seemed correct, it did not signify that the State and its officials could undertake any acts they desired.

118. It was emphasized that the topic also brought to the fore the Commission's own role in the implementation of its mandate, in the progressive development of international law and its codification, that could not be overlooked. In particular, questions were raised as to the perspective from which the Commission should approach the topic, whether, for example, by focusing on *lex lata* or *lex ferenda*. It was noted that even if one chose to adopt the approach of the Special Rapporteur, who had analysed the issues from a strict *lex lata* perspective, the interpretation given to the relevant State practice and judicial decisions available on this subject could plausibly lead one to different conclusions as to the existing law. To approach the topic from a *de lege ferenda* perspective raised other questions involving competing policy considerations, including to what extent the Commission should develop the law and whether it would be appropriate for it to take a lead in this area in light of the divergent policy considerations involved. The point was also made that the issues of principle implicated by the topic may not necessarily be best described in terms of

lex lata versus *de lege ferenda*, but rather involved the application of rules that were all *lex lata*.

119. Views were also expressed that the topic was particularly suitable to codification and progressive development and thus allowed the Commission to approach it from both aspects of its mandate. It was however necessary to proceed with caution in order to achieve an acceptable balance between the need to ensure stability in international relations and the need to avoid impunity for grave crimes under international law. In this regard, it was pointed out that in deciding on the approach to be adopted, it would be essential to keep in mind the practical value of the end product, which, after all, was intended to serve the interests of the international community. It was further observed that in approaching the question of immunity, it was important to recall that it was the legal and practical interests of the State that were engaged and not those of the individual. Attention was also drawn to the relevance of the law of special missions, both conventional and customary international law, for the consideration of the topic.

120. Some members were of view that the Commission should establish a working group to consider the questions raised in the discussions, as well as the question of how to proceed with the topic. While some members considered that the second report constituted a good point of departure for the elaboration of texts, the view was also expressed that the general direction in which the Commission wished to steer the topic had to be settled prior to moving forward. Whereas it was suggested that such a working group should be established already at the current session, some members considered it premature and preferred to postpone such a decision to the Commission's next session. Such an approach would allow for further reflection and would benefit from the input of Member States in the framework of the Sixth Committee, and of other interested entities.

(b) The question of possible exceptions to immunity

121. Diverse views informed the debate within the Commission on possible exceptions to immunity. It was pointed out that the Special Rapporteur, by arguing in his report that he did not find the various rationales for exceptions convincing and could not definitively assert that a trend toward the establishment of a norm on exceptions to immunity had developed, had set a very high standard that the exceptions must be founded in customary law. While some members agreed with the findings of the Special Rapporteur on this point, some other members expressed the view that the Commission could not limit itself to the *status quo* and had to take into account relevant trends that had an impact on the concept of immunity, in particular developments in human rights law and international criminal law. The assertion that immunity constituted the norm to which no exceptions existed was thus unsustainable. In this context, it was pointed out that the question of how to situate the rule on immunity in the overall legal context was central to the debate.

122. It was for example observed that with a different perspective, one could arrive at an opposite conclusion on what the law is; one could argue that a superior interest of the international community as a whole had evolved in relation to certain grave crimes under international law, which resulted in an absence of immunity in those cases. Instead of addressing the matter in terms of rule and exception, with immunity being the rule, it seemed more accurate to examine the issue from the perspective of responsibility of the State and its representatives in those limited situations — which shock the conscience of humankind — and consider whether any exceptions thereto, in the form of immunity, may exist.

123. According to another view, instead of starting from the premise that, as a general rule, State officials generally enjoyed immunity, and then consider exceptions as the Special Rapporteur had done, a reverse approach that starts from the premise that everyone

should be treated equally regardless of whether one was a Head of State or a private citizen should be followed. Accordingly, State officials would not be presumed to be immune, unless there were special reasons for immunity to be granted, and such would not be the case in respect of grave crimes under international law.

124. Views were also expressed that the principle of non-impunity for grave crimes under international law constituted a core value of the international community which needed to be considered while examining the question of immunity. The topic would thus be more appropriately addressed from the perspective of hierarchy of norms; or norms between which there existed some tension. It was contended that the practice of States in this area was far from uniform, affording the Commission an opportunity to weigh in for accountability.

125. Some members argued that there was sufficient basis in State practice to affirm the existence of exceptions to immunity of State officials when such officials had committed grave crimes under international law and references were also made to the previous work of the Commission, and in particular to the 1996 draft Code of Crimes against the Peace and Security of Mankind. In this context, it was observed that the status of the individual under international law had drastically changed since the Second World War; the individual not only enjoyed rights under international law but also had international obligations. It was also pointed out that the fact that an individual bore international criminal responsibility for certain acts did not signify the absence, or dissolution, of the responsibility of the State for those same acts; such responsibilities overlapped but each one had a separate existence.

126. References were also made to treaties concerning the repression of international crimes, which generally did not contain provisions concerning immunity or were silent on the question. It was contended that such silence could not be taken as an implicit recognition that immunity applies in all cases in relation to the crimes these treaties cover; such an interpretation would render them meaningless. The question was however also posed as to how widely one could construe silence in these circumstances as pointing to a particular direction and to conclude that immunity would not apply in respect of such acts.

127. It was further observed by some members that it had become increasingly clear that the International Criminal Court would not enjoy the full jurisdictional range that was once anticipated. It was therefore necessary to ensure that there were other means to try alleged offenders of grave crimes under international law, irrespective of whether or not they were State officials. It was argued that these trends could not simply be dismissed and even if the Commission were to concede that there was no basis in customary international law for exceptions to immunity, which was not certain, it should still engage in the progressive development in that area.

128. Some other members supported the Special Rapporteur's conclusions concerning exceptions to immunity. They nevertheless envisaged the possibility of some further analyses to elucidate possible limitations to immunity as part of the progressive development of international law. In this context, the view was expressed that in establishing any such limitations, immunity *ratione personae* must cease to exist only after the high-level officials no longer serve their term of office. In order to facilitate future discussions, it was suggested that a further analysis of the earlier work of the Commission in this area should be made, as well as a study on exceptions to immunity, focusing on State practice, distinguishing clearly between the *lex lata* and proposals *de lege ferenda*. It was further pointed out that it would be essential to shed more light on terms like "international crimes", "grave crimes" or "crimes under international law" for the purpose of the topic. The point was also made that the Commission should limit itself to consider immunity from criminal jurisdiction, it being noted that immunity from civil jurisdiction raised fundamentally different issues.

129. Some members also recalled the important role that the principle of immunity, which was well-established in customary international law, continued to play in ensuring stability in international relations and for the effective discharge by the State of its functions. It was pointed out that, as such, these factors too were of value to the international community. The idea that the principle of immunity was built on comity and reciprocity was also perceived as important in the context of the current debate, in particular in light of the imperative need to remove the risk of politically motivated criminal proceedings. Undue limitations on immunity may lead to serious frictions in international relations. In light of the foregoing, it was considered necessary, particularly seen against the background of contemporary developments in the law, to strike a balance in this area between the different policy considerations. A reference was made to the approach adopted by the Institute of International Law in its resolution of 2009[504] as a possible way forward.

130. Commenting individually on the *various rationales for possible exceptions* to immunity, some members contended that several of them merited further examination. Some members considered that the rationale that peremptory norms of international law prevail over the principle of immunity had merit. In their view, the report failed to provide a convincing analysis for the assertion that the different nature of the norms in play, procedural on the one hand and substantive on the other hand, prevented the application of hierarchy of norms; these aspects needed to be further analysed in light of existing State practice. It was contended that the reasoning of the minority in the *Al-Adsani* case[505] was convincing, meriting further consideration, and the fact that the case involved immunity from civil rather than criminal jurisdiction needed to be taken into account in appreciating the Court's decision. On the other hand, some members agreed with the Special Rapporteur that norms of a different nature should not be confused; to conclude that *jus cogens* norms were superior to rules governing immunity would be to confuse substance with rules of procedure.

131. The view that the commission of serious crimes under international law could not be considered as acts falling within the definition of official duties of a Head of State generated some support in the Commission and references were made to the *Bouterse* case[506] and opinions expressed in the *Pinochet* case.[507] It was noted that, if immunity was justified on the theory of preserving the honour and dignity of the State, then it was undercut when its officials committed grave crimes under international law. It was suggested that the Commission should identify the offences that could under no circumstances be considered as part of the official functions, referring to the crimes under the Rome Statute of the International Criminal Court as a useful starting point. The opinion was also expressed that in cases of universal jurisdiction, there were also grounds to argue that exemptions to immunity existed.

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[504] Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of international crimes, adopted by the Institute of International Law in 2009, article III: "1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes. 2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases. […]"

[505] European Court of Human Rights Judgment of 21 November 2001, *Case of Al-Adsani v. The United Kingdom* (App No. 35763/97).

[506] Amsterdam Court of Appeal, *Bouterse* case, para. 4.2 (Gerechtshof Amsterdam, 20 November 2000).

[507] See opinions by Lord Steyn and Lord Nicholls, *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 1).

(c) Scope of immunity

132. Comments were also made in a more general manner concerning the scope of immunity. While it was observed that immunity *ratione personae* covered acts both of a private and an official nature, concern was nevertheless expressed by some members over the categorical conclusion in the report that such immunity was absolute.[508] According to a view, immunity *ratione personae* should be limited to acts conducted while in office and not be extended to include acts undertaken prior thereto. Some members supported the view that, in addition to Heads of State or Government, ministers for foreign affairs also enjoyed immunity *ratione personae* and the Judgment of the Court in the *Arrest Warrant* case[509] was cited in support for such a position. Some other members however disagreed with the finding of the Court, pointing out that prior to it, it was far from generally accepted that immunity *ratione personae* could be extended in such a manner. In this regard, references were made to the dissenting and separate opinions in the *Arrest Warrant* case, the resolution by the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law,[510] as well as to the work of the Commission in the context its draft articles on jurisdictional immunities of States and their property.

133. While some members were of the opinion that the list of officials benefiting from immunity *ratione personae* should be restricted to the three categories of officials — the so-called troika — views were also expressed in favour of extending immunity to certain other high-level officials representing the State in its international relations; and involving a considerable amount of travel abroad. In order to determine how far the class of persons entitled to immunity *ratione personae* extends beyond the troika, it was suggested that the Commission consider the rationale behind such immunity.

134. The importance of ensuring uniformity between the rules governing immunity *ratione personae* in general and those governing immunity from certain criminal procedure measures entailing sanctions in case of non-compliance, was also emphasized. Any gaps in immunity of the troika would inhibit their ability to efficiently performing their duties.

135. While it was generally agreed that immunity *ratione materiae* only covered acts by State officials undertaken in their official capacity during their term in office, it was stressed that the issue raised many difficult considerations that still needed to be determined concerning the scope of such immunity and persons to be covered. It was observed that the question of attribution of conduct for the purpose of determining which acts were "official" and thus attributable to the State, and which were "private" also remained to be examined in closer detail. It was suggested that a more detailed review of the rationales behind immunity *ratione materiae* might be useful for this purpose, with the possibility of rethinking the whole notion of attribution. Recalling that immunity *ratione materiae* was a reflection of the immunity of the State, some members were of the opinion that *ultra vires* or unlawful acts should not be covered by such immunity since, in those situations, the official is acting neither under the instruction of the State nor under the authority of his functions. It was further pointed out that criminal proceedings against State officials and the establishment of State responsibility was not necessarily procedurally connected and that, if such a necessary connection existed, there was a risk that the State would waive immunity of its officials in an attempt to exonerate itself, even if only at a political level, from responsibility. In contrast, some other members agreed with the Special Rapporteur that,

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[508] A/CN.4/631, para. 94 (i).

[509] *Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[510] Vancouver session – 2001.

other than in a few exceptional situations, a link between the attribution of conduct for the purpose of State responsibility and of immunity necessarily existed, including with regard to acts *ultra vires*.

(d) Other comments

136. Some members emphasized that jurisdictional rules should not be confused with those on immunity. Absence of immunity would not necessarily lead to criminal proceedings; the jurisdictional conditions must still be fulfilled. Attention was drawn to the condition set forth in the 2005 resolution of the Institute of International Law[511] that the alleged offender is present in the territory of the prosecuting State when exercising universal jurisdiction.

137. The view was expressed supporting the conclusion in the report[512] that immunity is valid irrespective of whether the official is abroad or in his own State. The point was also made that the Rapporteur was correct in referring to absence of immunity where a State exercises criminal jurisdiction in situations when the State in question has neither consented to the performance on its territory of the activity which led to the crime nor to the presence on its territory of the foreign official.[513] It was also suggested that these kind of situations merited further discussion.

138 It was suggested that the Commission should consider the question of immunity of military personnel in armed conflict in its consideration of the topic. It was observed that it was in the field of international humanitarian law that the issue of exemptions on grounds of immunity had been discussed and analysed to a large extent. The evidentiary problems involved with such criminal procedures should not affect the underlying principle of the matter. A contrary observation was also made against convering military personnel for the purpose of the topic, since the matter was already largely regulated by treaty. It was observed that, with respect to immunity for military personnel in time of peace, there was need to distinguish between members of stationed forces and those of visiting forces; the former were governed by status-of-forces agreements, while the immunity of the latter was based in customary law – although it was not so significant in practice.

139. It was also noted that, in taking a maximalist approach in terms of scope, caution should be taken to exclude those categories of State officials whose immunities are provided by rules that have already been a subject of codification and progressive development..

140. It was also suggested that, as part of the topic, it might be useful to ensure adequate safeguards on prosecutorial discretion in order to avoid abuse.

3. Introduction by the Special Rapporteur of his third report

141. While in his preliminary and second reports, the Special Rapporteur considered the substantive aspects of the immunity of the State official from criminal jurisdiction, the third report (A/CN.4/646) — intended to complete the entire picture — addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver, including whether immunity can still be invoked subsequent to its waiver. The Special Rapporteur stressed that while the previous reports

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[511] Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session – 2005.

[512] A/CN.4/631, para. 94 (m).

[513] *Ibid.*, para. 94 (p).

had been based on an assessment of State practice, the present report, even though there was available practice, was largely deductive, reflecting extrapolations of logic and offering broad propositions, not exactly precise in terms of drafting, for consideration. It was also underscored that the issues considered in the third report were of great importance in that they went some way in determining the balance between the interests of States and safeguarding against impunity by assuring individual criminal responsibility.

142. As regards the *timing*, namely when and at what stage immunity should be raised in criminal proceedings, the Special Rapporteur, recalling in particular the advisory opinion of the International Court of Justice *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that questions of immunity were preliminary issues, which must be expeditiously decided *in limine litis*, stressed that the question of the immunity of a State official from foreign criminal jurisdiction should in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the question of taking criminal procedural measures which are precluded by immunity in respect of the official. Any failure do so may be viewed as a violation of the obligations of norms governing immunity by the State exercising jurisdiction, even in situations which may relate to the consideration of the question of immunity at the pretrial stage of the exercise of criminal jurisdiction at the time when the question of the adoption of measures precluded by immunity was addressed.

143. However, such violation may not necessarily be involved where the State of the official who enjoys immunity *ratione materiae* does not invoke his immunity or invokes it at a later stage in the proceedings; any possibility of violation ensues after invocation.

144. On *invocation of immunity*, meaning, *inter alia*, who was in a position legally to raise the issue of immunity, the Special Rapporteur emphasized that only the invocation of immunity or a declaration of immunity by the State of the official, and not by the official himself, constituted a legally relevant invocation or declaration capable of having legal consequences.

145. In order for immunity to be invoked, the State of the official must know that corresponding criminal procedural measures were being taken or planned in respect of the official concerning whom the invocation related. Accordingly, the State that was planning such measures must inform the State of the official in this regard. The Special Rapporteur drew attention to the distinction that ought to be made based on the immunity *ratione personae* and immunity *ratione materiae*.

146. First, in respect of a foreign Head of State, Head of Government or minister for foreign affairs — the troika — the State exercising criminal jurisdiction itself must consider *proprio motu* the question of the immunity of the person concerned and determine its position regarding its further action within the framework of international law. The Special Rapporteur suggested that in this case it was appropriate perhaps to request the State of the official in question only for a waiver of immunity. Accordingly, the State of the official in this case did not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.

147. Secondly, where an official enjoying immunity *ratione materiae* was concerned, the burden of invoking immunity resided in the State of the official. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed immunity and acted in an official capacity. Otherwise, the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.

148. Thirdly, there was also the possible case of an official other than the troika, who enjoyed immunity *ratione personae*, in which case the burden of invoking immunity also lay with the State of the official in relation to whom immunity was invoked. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed personal immunity since he occupied a high-level position which, in addition to participation in international relations, required the performance of functions that were important for ensuring the sovereignty of the State.

149. On the *mode* of invocation, the State of the official, irrespective of the level of the official, was not obliged to invoke immunity before a foreign court in order for that court to consider the question of immunity; communication through the diplomatic channels sufficed. The absence of an obligation on the part of a State to deal directly with a foreign court was based on the principle of sovereignty and the sovereign equality of States.

150. As regards possible *grounds* for invocation, the State of the official invoking immunity was not obliged to provide grounds for immunity other than to assert that the person in question was its official and enjoyed immunity having acted in an official capacity or that the person in question was its official who enjoyed immunity *ratione personae* since he occupied a high-level post which, in addition to participation in international relations, required the performance of functions that were important for ensuring that State's sovereignty.

151. On the other hand, the Special Rapporteur pointed out that the State (including its court) that was exercising jurisdiction, it would seem, was not obliged to "blindly accept" any claim by the State of the official concerning immunity. However, a foreign State may not disregard such a claim if the circumstances of the case clearly did not indicate otherwise. It was the prerogative of the State of the official, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of the functions carried out by a high-ranking official for the purpose of ensuring State sovereignty.

152. Concerning *waiver of immunity*, the Special Rapporteur noted that the right to waive the immunity of an official was vested in the State, not in the official himself. When a Head of State or Government or a minister for foreign affairs waived immunity with respect to himself, the State exercising criminal jurisdiction against such an official had the right to assume that such was the wish of the State of the official, at least until it was otherwise notified by that State.

153. The waiver of immunity of a serving Head of State, Head of Government or minister for foreign affairs must be express. In a hypothetical situation in which the State of such an official requested a foreign State to carry out some type of criminal procedure measures in respect of the official, such act could possibly constitute an exception. Such a request unequivocally involved a waiver of immunity with respect to such measures and in such a case the waiver was implied.

154. A waiver of immunity for officials other than the troika but who enjoyed immunity *ratione personae*, of officials who had immunity *ratione materiae*, as well as of former officials who also had immunity *ratione materiae*, may be either express or implied. Implied waiver in this case may be imputed, *inter alia*, from the non-invocation of immunity by the State of the official.

155. In the view of the Special Rapporteur, it would seem that, following an express waiver of immunity, it was legally impossible to invoke immunity. At the same time, it was also noted that an express waiver of immunity may in some cases pertain only to immunity with regard to specific measures.

156. In the case of an initial implied waiver of immunity expressed in the non-invocation of the immunity in respect of an official enjoying immunity *ratione materiae* or of an official enjoying immunity *ratione personae* other than the troika, immunity may, it would seem in the view of the Special Rapporteur, be invoked at a later stage in the criminal process, including, *inter alia*, when the case was referred to a court. However, there was doubt as to whether a State which had not invoked such immunity in the court of first instance may invoke it subsequently in appeal proceedings. In any event, the procedural steps which had already been taken in such a situation by the State exercising jurisdiction in respect of the official at the time of the invocation of immunity may not be considered a wrongful act.

157. The Special Rapporteur pointed out that once a waiver of immunity was validly made by the State of the official it was possible to exercise to the full extent foreign criminal jurisdiction in respect of that official.

158. The Special Rapporteur also alluded to a related aspect concerning the *relationship between a State's assertion that its official had immunity and the responsibility of that State for an internationally wrongful act* in respect of the conduct which gave rise to invocation of immunity of the official, underscoring that irrespective of the waiver of immunity with regard to its official, the State of the official was not exempt from international legal responsibility for acts attributed to it in respect of any conduct that may have given rise to questions of immunity. Since the act in respect of which immunity was invoked could also constitute an act attributable to the State itself, the necessary prerequisites engaging the responsibility of the States may be in place making it amenable for a claim to be instituted against it.

4. Summary of the debate on the Special Rapporteur's third report

(a) General comments

159. The Special Rapporteur was once more commended for a thorough, well researched and well argued Report, which together with previous Reports, provided a comprehensive view of the topic, and laid the foundation for future work, although no draft articles had been provided.

160. Generally, it was considered that the analysis made in the report was convincing and the extrapolations drawn logical. Although the third report was viewed as less open to debate than the second report, some comments were nevertheless made that procedurally it would have been more appropriate to consider it after the Commission had reached definitive conclusions on the second report, the debate concerning which highlighted the fact that there were still a number of basic issues that needed to be resolved, bearing on the direction of the topic as a whole. As a consequence of these unresolved issues — including the scope of immunity *ratione personae* in the case where grave international crimes had been committed — there were certain aspects in the third report, particularly some of the conclusions drawn, which were substantively problematic.

161. On the other hand, some members took the view that the third report was an important part of the overall picture drawn by the Special Rapporteur and could easily have been part of the second report. Nevertheless some other members preferred to comment on the third report with a caveat, noting in particular that their concerns raised in regard to the second report, including the seemingly absolutist and expansive approach to immunity, remained.

162. It was also observed that some of the views presented certain risks for the future not only for the Commission but also for the development of international law itself. It was

cautioned that there was a risk to the reputation of the Commission if there was a greater tilt towards State interests; the Commission would not be in a position to find the necessary balance between the old law — based on an absolute conception of sovereignty — and the new expectation of the international community in favour of accountability. Others preferred a balance between legitimate interests of sovereign States and the concern for accountability. Some members noted that the Commission had no cause to be concerned about risking its reputation since it was part of its functioning always to balance different legitimate considerations and not let itself be disproportionately swayed by any one of them. What would be damaging to the Commission would be if it adopted unrealistic positions, eschewing practical solutions, based on its collective wisdom informed by the available tools of analysis of the practice, addressing practical concerns of States.

(b) Timing

163. There was general agreement that immunity ought to be considered at the early stage of the proceedings or indeed earlier during the pretrial stages, including when a State exercising jurisdiction takes criminal procedure measures against an official that would otherwise be precluded by immunity. It was however recognized that in practice such a goal might be difficult to realize, and would likely necessitate appropriate domestic legislation. It was suggested that failure to consider immunity at an early stage might involve possible violations of obligations of immunity arising as a result of such failure. The point was also made that the report did not address directly the question of inviolability, which may bear on issues of timing and the inconvenience presented by arrest or detention of an official, and was relevant to invocation as well; these aspects required further consideration.

(c) Invocation of immunity

164. At a more general level, it was noted that it might be useful to have more information about the procedural position in the practice of States under the various legal systems. However, some members largely agreed with the Special Rapporteur in his conclusions on invocation. There was agreement in the general proposition that only the invocation of immunity by the State of the official and not the official himself constituted a legally relevant invocation of immunity. It was however suggested that in practice this did not preclude the official — because of the element of time and being present — from notifying the State exercising jurisdiction that he enjoyed immunity; such notification could then trigger the process by which the State exercising jurisdiction informed the State of the official about the situation of the official.

165. It was also generally accepted that it was sufficient for the State claiming immunity to notify the State exercising jurisdiction through diplomatic channels. According to a particular viewpoint, a State was well advised to be categorical if it sought to have the immunity of its official upheld, and where the legal or factual issues surrounding immunity were complex it could participate directly, although there was no obligation to do so, in the proceedings to explain its case.

166. On the issue who has the *burden* of invoking immunity, some members agreed with the Special Rapporteur that in respect of the troika, the State exercising jurisdiction must itself consider the question of immunity.

167. It was also noted that in respect of other officials enjoying immunity *ratione materiae* the State of the official must invoke the immunity. It was however contended that the reasoning for the State exercising jurisdiction raising the question of immunity *proprio motu* could not be limited to cases where the immunity of the troika was implicated. It was claimed that it was equally applicable to cases where it was manifestly apparent, in the circumstances of the case, that jurisdiction would be exercised with respect to an official

who has acted in his official capacity. Such a standard would protect the smooth conduct of international relations and would prevent mutual recriminations on account for example that the measures taken were politically motivated. Moreover, while agreeing that the State exercising jurisdiction had no obligation in respect of immunity *ratione materiae* to inquire into immunity *proprio motu*, it was nevertheless suggested that some guidelines as to the circumstances in which the State exercising jurisdiction may exercise discretion *proprio motu* could be recommended.

168. Another view was expressed that there was no clear distinction between invocation in relation to the troika and as it concerned such other high-level officials as may enjoy immunity *ratione personae*. It was thus doubted that any hard and fast rules could be laid down since much depended on the particular circumstances of each individual case.

169. It was also noted that some of the uncertainties over whether the troika should be enlarged to include other high-level officials, such as ministers of international trade or of defence, that were raised in the debate on the second report were germane to the present report. This was more so when considered against the differentiation drawn between the troika and other State officials enjoying immunity *ratione materiae*. While the reasons offered by the Special Rapporteur for the differentiation seemed plausible and convincing, it was contended that if in contemporary international relations, a foreign minister was only one among several State officials who frequently represented the State abroad, then a distinction in the way immunity was to be asserted — based on being widely known — did not appear to be justified. Consequently, there could be a basis for considering further the conclusions of the Special Rapporteur on who bears the burden of invoking immunity, allowing the State of the official to invoke immunity without making any distinction. Similar considerations could be taken into account in respect of waiver of immunity.

170. It was also suggested that further consideration may need to be given to the possibilities of enhancing cooperation between States in matters relating to invocation between the State exercising jurisdiction and the State of the official, in respect of the troika as well as the others.

171. Some other members viewed the conclusions of the Special Rapporteur on invocation from a different perspective. For instance, doubt was expressed regarding whether immunity *ratione personae* should be extended to the foreign minister on the one hand and other high-level officials on the other for the purposes of the topic, viewing the matter as a still open question, and evidencing an expansive approach, raising the spectre of criticism that the Commission wished to expand immunity at a time when there was demand for limited immunity, more accountability and less impunity. Quite apart from the available case law on the question, some members however recalled that the questions of immunity of Heads of State or Government, ministers of foreign affairs and other high-level officials had been discussed in the Commission before, most recently in the context of its work on jurisdictional immunities of States and their property and appeared to have been settled when the Special Rapporteur for that topic conceded that he would not object to adding a reference to such persons while doubting that their families had special status "on the basis of established rules of international law".[514] The view was also expressed that there was no doubt that under customary international law, heads of State, heads of Government and ministers for foreign affairs enjoyed immunity. Any attempts to cast doubts on this were misplaced.

172. It was also noted that the Special Rapporteur in the present report, as in previous reports, had not distinguished "ordinary" crimes, concerning which matters were implicated

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[514] *Yearbook ... 1989*, vol. II, Part II, paras. 443–450.

in the *Case concerning certain questions of mutual assistance in criminal matters*, from grave international crimes, in relation to which special considerations applied, as had been countenanced in the debate on the second report. Consequently, it was pointed out that the Special Rapporteur had failed to address the possibility that the procedural issue at hand was not one of invocation of immunity or waiver thereof but rather the absence of immunity in respect of situations in which grave international crimes were committed, although it was also countered by other members that the assertion that there was no immunity for such "core crimes" was abstract and general, and the Commission will have to deal with these matters in greater detail at a later stage.

173. It was also observed that the Special Rapporteur in his report did not consider the procedural problems that would arise in relations between States when domestic law prohibited invocation of immunity in respect of "core crimes" as a result of implementation by such States of its international obligations, as was the case with domestic legislation implementing the Rome Statute.

174. Comments were also made regarding the question of *substantiation* of immunity in respect of immunity *ratione materiae*. Regarding the conclusion of the Special Rapporteur that it was the prerogative of the State of the official to characterize the conduct of an official as being official conduct of the State, but that the State exercising criminal jurisdiction did not have to "blindly accept" such a characterization, it was suggested that such a conclusion seemed rather broad and unclear. It was necessary to find a balance, each case had to be assessed on its merits, the use of terms like "prerogative" and suggesting that there was a "presumption" arising out of mere appointment of an official was going too far (although some members did not see anything untoward in its use). In the *Advisory Opinion on the immunity of the Special Rapporteur of the Commission of Human Rights*, on which the Special Rapporteur relied, the Secretary-General in fact claimed that the individual concerned was acting as an official. The *Advisory Opinion* was a confirmation of the general proposition that if the official capacity of the person and the official nature of his acts were manifest in a specific situation the burden to demonstrate that he was acting in an official capacity was significantly alleviated. Moreover, since the "presumption" did not operate in respect of officials other than the *troika*, it was pointed out that the granting of or refusal to grant immunity must be decided on a case-by-case basis, taking into account all the elements in the case. The national courts would assess whether they were dealing with acts performed in the context of official functions or not.

175. It was also pointed out that State invoking immunity should at least be encouraged to provide the grounds for its invocation. Some concerns were expressed that if a State could invoke the immunity for all of its officials enjoying *immunity ratione materiae* without substantiation as to the nature of the act, other than to say that an official was acting in an official capacity, that would be tantamount to according *de facto* immunity *ratione personae* to all its State officials, leading to the possibility of immunity for acts in fact committed in a private capacity. In order to avoid such possibility — and the obvious potential for impunity — a State should have an obligation to substantiate when invoking immunity *ratione materiae*. It was also suggested that the State claiming immunity must be made to justify its plea for immunity when grave international crimes were involved; there ought to be an obligation of justification, not merely of assertion of immunity.

(d) Waiver of immunity

176. Some members agreed with the Special Rapporteur that the right to waive immunity vested in the State of the official not in the official himself and that waiver of immunity *ratione personae* must be express.

177. It was, however, observed that two situations concerning waiver of immunity needed be distinguished, namely waiver of immunity in individual cases and renunciations of immunity for certain categories of cases which may be contained in a treaty rule. While in both cases, the common standard identifying such exceptions to otherwise applicable immunity was whether the waiver or renunciation was "certain", it should not obscure the fact that the determination of when immunity was excluded was different, the issue in the latter case being one of treaty interpretation.

178. In this regard, while some members agreed that there was a general reluctance to accept an implied waiver based on the acceptance of an agreement, some doubts were expressed by others regarding the assertion by the Special Rapporteur in his report that State's consent to be bound by an international agreement establishing universal jurisdiction for grave international crimes or precluding immunity did not imply consent to the exercise of foreign criminal jurisdiction in respect of its officials, and therefore waiver of immunity. It was contended that to suggest that such an agreement could not be construed as implicitly waiving the immunity of the official of the State party unless there was evidence that that State so intended or desired, seemed to run contrary to article 31 of the Vienna Convention on the Law of Treaties. In the *Pinochet case* (*No. 3*), the House of Lords reached its conclusion in respect of the United Nations Convention against Torture, after a detailed analysis of the terms of that convention. It was asserted that in concluding an agreement establishing universal jurisdiction, with *aut dedere aut judicare* provisions and establishing criminal jurisdiction for grave international crimes without any distinction based on official capacity of the perpetrator, pointed to a construction that the States parties intended to exclude immunity. However, the view was also expressed that such an inference could not be lightly drawn and that the *Pinochet* proposition could not be applied across the board as a general proposition.

179. In the case of a waiver in an individual case, the standard of certainty implied some *bona fide* duty to inquire with the other State in case where there were any doubts, as it could not be lightly assumed that certain conduct by another State constituted a waiver of immunity. At the same time, States had a duty to express themselves clearly within a reasonable time, if they wished to claim immunity, when they were confronted with a situation which required their response.

180. On whether *non-invocation* by a State of the immunity of an official could be considered an implied waiver, it was noted that as long as a State did not have knowledge, which was certain, of the exercise of jurisdiction over one of its officials, or had not yet had sufficient time to consider its response, the non-invocation of immunity cannot be taken as a waiver. However, once the State concerned has been fully informed and given an appropriate time for reflection (which need not be very long), non-invocation of immunity would usually have to be considered as constituting an implied waiver.

181. Some members agreed that a waiver once made cannot be revoked, as this was necessary in the interest of legal certainty and procedural security. It was important that the character of a waiver as a unilateral legal act which finally determined the position of a State with respect to one of its rights should not be put into question. In this regard, some members doubted that following the non-invocation of immunity *ratione materiae* of an official or immunity *ratione personae* of an official other than the troika, immunity may be invoked when the proceedings were in the appeal stage.

182. However, it was acknowledged that a limited waiver which enabled a State to take certain preliminary measures would not preclude the invocation of immunity at a later stage of a trial in respect of a prosecution.

(e) Relationship between invocation of immunity and the responsibility of that State for an internationally wrongful act

183. Some members agreed with the assertion by the Special Rapporteur that the State which invokes immunity of its official on the grounds that the act with which that official was charged was of an official nature was acknowledging that such act was an act of the State itself; by doing so, however, it was not necessarily acknowledging its responsibility for that act as an internationally wrongful act.

184. It was noted, however, that it had to be recognized that there were times when immunity may be invoked to avoid the possibility of a serious intrusion into the internal affairs of a State, not to mention that the State of the official might itself wish to investigate and, if warranted, prosecute its own official or a State may wish to invoke immunity quickly, in order to avoid undue embarrassment or suffering on the part of its official.

185. Looking forward, it was suggested that at the next session, preferably in the context of a working group, the Commission should first examine the general direction of the topic, focussing on the question concerning the extent to which there ought to be exceptions to immunity of State officials, particularly in respect of grave crimes under international law. In the light of conclusions reached in such a working group a decision could then be made on how the Commission would move forward on the topic.

5. Concluding remarks of the Special Rapporteur

186. The Special Rapporteur thanked members for the very useful, interesting and critical comments on his reports, noting that the interventions revealed a variety of schools of thought.

187. The Special Rapporteur contextualized the issues by recalling that there were many truisms in international law, including that the development of human rights had not resulted in the disappearance of sovereignty or the elimination of the principles of sovereign equality of States and non-interference in the internal affairs, despite having a serious influence on their content. The central issue for consideration in the present topic was not so much the extent to which changes occurring in the world and in international law had had an influence on sovereignty as a whole, but rather how more specifically there was an influence on the immunity of State officials, based on the sovereignty of a State; the essential question being how had the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular been affected.

188. While conceding that the impact on the vertical relationship, namely how international criminal jurisdiction had been affected, was very clear, the Special Rapporteur noted such was not the case with respect to the quite distinct and separate horizontal relationship involving interactions between sovereign States and their national criminal jurisdictions. The question of international criminal jurisdiction was entirely one that was to be separated and distinguished from foreign criminal jurisdiction. In his view, article 27 of the Rome Statute of the International Criminal Court which was often invoked as evidencing the changes that had taken place was unlikely to be relevant in respect of foreign criminal jurisdiction. If it was to be asserted, it could not be done without taking full account also of the implications of article 98 of the same Statute.

189. The Special Rapporteur affirmed that his explicit positions on the issues as reflected in the second report were reached not on *a priori* basis but after a review of State practice, case law and the doctrine, bearing in mind his professional life experience and legal background. Such review revealed that the interaction between sovereignty and immunity in respect of foreign national jurisdiction had not become insignificant. States were still cautious about protecting their interests, particularly in respect of the exercise of

jurisdiction, much more so with respect to criminal jurisdiction than civil jurisdiction, because it involved the deprivation of freedom, and possibilities of detention and arrest; all these indirectly affected the exercise of sovereignty of a State and the internal competence of the State. This was why immunity was still important; despite the various developments in the international system, the fundamentals on this aspect remained the same.

190. He stressed that practice and doctrine had led him to accord significance to the distinction between immunity *ratione personae* and immunity *ratione materiae* and this difference needed to be taken into account in the substantive and procedural consideration of the topic.

191. He confirmed the assumption that immunity *ratione materiae* applied to all State officials and former officials in respect of acts carried out in an official capacity.

192. Regarding the circle of persons enjoying immunity *ratione personae*, the Special Rapporteur reaffirmed that there was no doubt, based on an objective legal analysis, that the troika enjoyed immunity. Such immunity was not exclusive to the troika. Indeed, the nature of representation in international relations had changed; it was no longer exclusive to the troika and the judicial decisions, at the international and national levels, showed that certain high-level State officers enjoyed immunity *ratione personae*. On the contrary, there was no case to his knowledge that concluded that such immunity would not be extended to officials beyond the troika. It was in recognition of the need to be prudent that he had suggested that there might be need to establish criteria for high-level officials enjoying immunity *ratione personae*, and to maintain a distinction between such officials and the troika in respect of invocation and waiver of immunity as a matter of procedure.

193. He acknowledged that there were serious conceptual differences in the debate concerning immunity and exceptions to immunity. However, whichever position was preferred conceptually, it was firmly established in international law that certain holders of high ranking office in a State enjoyed immunity, both civil and criminal, from jurisdiction in other States. This was a norm — not allowing exceptions — which applied to the troika. This was confirmed by two decisions of the International Court Justice and this was broadly supported by State practice, in national court decisions and doctrine. He conceded that his use of "absolute" in the report was not entirely felicitous because even in case of immunity *ratione personae*, such immunity was limited in time and substance.

194. In the circumstances, if there was room for exceptions, the Commission would have to look to immunity *ratione materiae*. Practice and decisions, however, did not reveal a trend in favour of such exclusions, except in the one case when the crime was committed in the territory of the State exercising jurisdiction.

195. He stressed that in order for a trend to establish an emerging norm, practice needed to be prevalent and this was not the case with respect to exceptions, even in the case of immunity *ratione materiae*. He, however, noted that there was room to consider other justifications for such exclusion that were not considered in his second report such as suspension of immunity as a countermeasure or non-declaration of immunity. It might be useful for States to provide information on these aspects.

196. The Special Rapporteur also noted that despite all this, the Commission was not precluded from developing new norms of international law when expectations with regard to its effectiveness were justified.

197. Addressing the various rationales for possible exceptions, the Special Rapporteur noted, with regard to an exclusion on the basis of equality before the law, that he did not think it was entirely convincing, considering that some officials within their own jurisdictions enjoy immunity.

198. The Special Rapporteur also notes that to juxtapose immunity and combating impunity was incorrect, it did not tell the whole story; combating impunity had a wider context involving a variety of interventions in international law, including the establishment of international criminal jurisdiction. The Special Rapporteur, in responding to the comments on the need for balance, recalled that immunity did not mean impunity. Moreover, immunity from criminal jurisdiction and individual criminal responsibility were separate concepts. Immunity and foreign criminal jurisdiction was the issue to be grappled with and not immunity and responsibility. The rules on immunity as they presently existed already provided some balance in the way the system as whole operated. He also noted that the institution of universal criminal jurisdiction was itself not popular among States not because of immunity but there was a reluctance to employ it in relation to the interaction *vis-a-vis* other States. He recalled that he had written in his second report, and he continued to think that it was the case, that the exercise of extraterritorial jurisdiction was undertaken mostly in developed countries with respect to serving or former officials of developing States.

199. On the third report, he welcomed the fact that it was less contentious and the various conclusions had broadly been found reasonable. He agreed that issues of inviolability were important and needed to be addressed.

200. The Special Rapporteur noted that in future it will be necessary to devote attention to circumstances in which cooperation among States could be enhanced on issues of the immunity of States officials and exercise of jurisdiction, as well as matters concerning settlement of disputes.

201. He clarified that the various conclusions in the reports were not intended to be draft articles; they only reflected a summary for the convenience of the reader. To formulate draft articles at this stage before resolving the basic issues would be premature.

202. On the question of the interaction, at this stage, with States, the Special Rapporteur noted that it might be useful to receive their detailed comments in the Sixth Committee on the debate at the present session, taking into account in particular the second report, as well as information on State practice, including legislation and court decisions on the issues raised in the second and third reports and in the debate.

203. Responding to comments about the reputation of the Commission, the Special Rapporteur opted to emphasize the importance of the responsibility of the Commission and of those who write on issues of international law, noting in particular that what is written, as constituting subsidiary sources of international law, had consequences, positive and negative, for the development of international law.

Chapter VIII
Expulsion of aliens

A. Introduction

204. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[515] The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

205. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554).[516]

206. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573 and Corr.1) and a study prepared by the Secretariat (A/CN.4/565 and Corr.1). The Commission decided to consider the second report at its next session, in 2007.[517]

207. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,[518] and draft articles 3 to 7.[519]

208. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594) and decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.[520] During the same session, the Commission approved the working group's conclusions and requested the Drafting Committee to take them into consideration in its work.[521]

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[515] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid., Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and at its fifty-second session (2000) it confirmed that decision (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic in the long-term programme of work.

[516] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), paras. 242–274.

[517] *Ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 252.

[518] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), footnotes 401 and 402.

[519] *Ibid.*, footnotes 396 to 400.

[520] *Ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 170.

[521] The conclusions were as follows: (1) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities; and (2) the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals; *ibid.*, paragraph 171.

209. At its sixty-first session (2009), the Commission considered the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1). At the Commission's request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.[522]

210. At its sixty-second session (2010), the Commission considered the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur (A/CN.4/617), together with the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1). It referred to the Drafting Committee revised draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled;[523] draft articles A and 9,[524] as contained in the sixth report of the Special Rapporteur (A/CN.4/625); draft articles B1 and C1,[525] as contained in the first addendum to the sixth report (A/CN.4/625/Add.1); as well as draft articles B and A1,[526] as revised by the Special Rapporteur during the sixty-second session.

B. Consideration of the topic at the present session

211. At the present session, the Commission had before it the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), which it considered at its 3091st to 3094th meetings, from 24 to 27 May 2011; and the Special Rapporteur's seventh report (A/CN.4/642), which it considered at its 3098th meeting, on 4 July 2011. The Commission also had before it comments received from Governments.[527]

212. At its 3094th meeting, on 27 May 2011, the Commission decided to refer to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in the second addendum to the sixth report; draft article F1, also contained in the second addendum, as revised by the Special Rapporteur during the session,[528] and draft article 8, in the revised version introduced by the Special Rapporteur during the sixty-second session.[529]

213. At its 3098th meeting, on 4 July 2011, the Commission decided to refer to the Drafting Committee the restructured summary of the draft articles contained in the seventh report of the Special Rapporteur.[530]

214. At its 3126th meeting, on 11 August 2011, the Commission took note of an interim report by the Chairman of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.

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[522] *Ibid., Sixty-fourth Session No. 10* (A/64/10), para. 91.

[523] *Ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), footnotes 1244 to 1251.

[524] *Ibid.*, footnotes 1255 and 1258.

[525] *Ibid.*, footnotes 1263 and 1264.

[526] *Ibid.*, footnotes 1260 and 1269.

[527] See A/CN.4/604 and A/CN.4/628 and Add.1.

[528] See footnote 534 below.

[529] See footnote 540 below.

[530] A/CN.4/642, pp. 14 to 16.

1. Introduction by the Special Rapporteur of the remaining portion of his sixth report and of his seventh report

215. The second addendum to the sixth report (A/CN.4/625/Add.2) marked the conclusion of the consideration of expulsion procedures and took up the legal consequences of expulsion. The second addendum also contained the last of the draft articles that the Special Rapporteur intended to propose.

216. The first question considered, that of the implementation of the expulsion decision, was the subject of draft article D1,[531] which covered both voluntary and forcible expulsion. The reference to the rules of air travel in paragraph 2 was merely illustrative.

217. The next subject addressed in the second addendum was the right to appeal an expulsion decision, something that had already been mentioned briefly in the first addendum (A/CN.4/625/Add.1) in connection with the right to challenge the expulsion decision, set out in draft article C1. While no new draft article on the subject was proposed, consideration was given to the basis of the right to appeal, which could be found in both international and domestic law; the time frame for reviewing an appeal; the suspensive effect of remedies; and remedies against a judicial expulsion decision.

218. The next subject discussed in the second addendum was relations between the expelling State and the transit and receiving States, which were governed by two principles: the freedom of a State to receive or to deny entry to an expelled alien, a freedom limited by the right of any person to return to his or her own country; and the freedom, likewise limited, of the expellee to determine his or her State of destination. Mention had also to be made of the "safe country" concept, although it was still evolving and was confined for the time being to European practice. Draft article E1 concerned the identification of the State of destination of expelled aliens.[532]

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[531] Draft article D1 read:

Return to the receiving State of the alien being expelled

1. The expelling State shall encourage the alien being expelled to comply with the expulsion decision voluntarily.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the orderly transportation to the receiving State of the alien being expelled, in accordance with the rules of international law, in particular those relating to air travel.

3. In all cases, the expelling State shall give the alien being expelled appropriate notice to prepare for his/her departure, unless there is reason to believe that the alien in question could abscond during such a period.

[532] Draft article E1 read:

State of destination of expelled aliens

1. An alien subject to expulsion shall be expelled to his or her State of nationality.

2. Where the State of nationality has not been identified, or the alien subject to expulsion is at risk of torture or inhuman and degrading treatment in that State, he or she shall be expelled to the State of residence, the passport-issuing State, the State of embarkation, or to any other State willing to accept him or her, whether as a result of a treaty obligation or at the request of the expelling State or, where appropriate, of the alien in question.

3. An alien may not be expelled to a State that has not consented to admit him or her into its territory or that refuses to do so, unless the State in question is the alien's State of nationality.

219. Draft article F1,[533] for which the Special Rapporteur had introduced a revised version[534] during the session, concerned the protection of the human rights of aliens subject to expulsion in the transit State. That provision, reflecting logic more than established practice, specified that the rules that applied in the expelling State to protection of the human rights of aliens subject to expulsion applied *mutatis mutandis* in the transit State. The Special Rapporteur was of the view that the elaboration of a legal framework for transit in the context of the expulsion of aliens would go beyond the scope of the current topic.

220. The next subject examined in the second addendum was the legal consequences of expulsion from the standpoint of the rights of expelled aliens (protection of the property rights and similar interests of expelled aliens, on the one hand, and the right of return in cases of unlawful expulsion, on the other) and of the responsibility of the expelling State.

221. The protection of the property of aliens facing expulsion, the subject of draft article G1,[535] was well established in international law. Paragraph 1 enunciated the prohibition of the expulsion of an alien for the purpose of confiscating his or her assets, while paragraph 2 concerned the protection, free disposal and, where appropriate, return of property. The Special Rapporteur believed that the fate of property belonging to aliens expelled during armed conflict must be examined in the light of *jus in bello*, something that did not fall within the ambit of the present topic.

222. As to the right of return in cases of unlawful expulsion, national practice seemed to be too varied for such a right to be regarded as deriving from a rule of customary law. Still, it would be illogical to say that an alien expelled on the basis of erroneous facts or mistaken grounds as established by the competent authorities of the expelling State did not have the right to re-enter the expelling State on the basis of a ruling annulling the disputed decision. That was why the Special Rapporteur proposed that, in draft article H1,[536] the Commission enunciate a right of return as part of the progressive development of international law.

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[533] The original version of draft article F1 read:

Protecting the human rights of aliens subject to expulsion in the transit State

The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall also apply in the transit State.

[534] The revised version of F1 read:

Protecting the human rights of aliens subject to expulsion in the transit State

The rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State.

[535] Draft article G1 read:

Protecting the property of aliens facing expulsion

1. The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

2. The expelling State shall protect the property of any alien facing expulsion, shall allow the alien [to the extent possible] to dispose freely of the said property, even from abroad, and shall return it to the alien at his or her request or that of his or her heirs or beneficiaries.

[536] Draft article H1 read:

Right of return to the expelling State

An alien expelled on mistaken grounds or in violation of law or international law shall have the right of return to the expelling State on the basis of the annulment of the expulsion decision, save where his or her return constitutes a threat to public order or public security.

223. The question of the responsibility of the expelling State in cases of unlawful expulsion was considered in the final part of the second addendum. Draft article I1,[537] which set out the principle of such responsibility, and draft article J1,[538] which addressed the implementation of that responsibility through the mechanism of diplomatic protection, were conceived as clauses merely referring to those legal institutions. The commentary to draft article I1 might mention the emergence of the concept, recognized by the Inter-American Court of Human Rights,[539] of particular damages for the interruption of the life plan.

224. The Special Rapporteur would also like the Commission to take a position on revised draft article 8, entitled "Expulsion in connection with extradition", which he had introduced during the sixty-second session to take into account the comments of a number of members during the debate on the first addendum to the sixth report.[540]

225. The seventh report (A/CN.4/642) gave an overview of recent developments relevant to the topic and contained a restructured summary of the draft articles.

226. The national developments referred to in the seventh report included a popular initiative, "For the expulsion of foreign criminals", adopted by the people and cantons of Switzerland on 28 November 2010 and calling for the automatic expulsion of aliens convicted of certain offences or having fraudulently received social security or social assistance; and draft French legislation on immigration, integration and nationality, rejected by the Senate on 3 February 2011, envisaging the deprivation of French nationality, potentially followed by expulsion, of citizens who had been naturalized for less than 10 years and had caused the death of a public servant.

227. The seventh report then examined the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case,[541] which addressed seven points in relation to expulsion: conformity with the law; the obligation to inform aliens detained pending expulsion of the reasons for their arrest; the obligation to inform aliens subject to expulsion of the grounds for their expulsion; prohibition of mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to inform the consular authorities of the State of origin without delay of the detention of their national with a view to expulsion; the obligation to respect the right to property of aliens subject to expulsion; and recognition of the responsibility of the expelling State and the provision by it of

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[537] Draft article I1 read:

> **The responsibility of States in cases of unlawful expulsion**
>
> The legal consequences of an unlawful [illegal] expulsion are governed by the general regime of the responsibility of States for internationally wrongful acts.

[538] Draft article J1 read:

> **Diplomatic protection**
>
> The expelled alien's State of nationality may exercise its diplomatic protection on behalf of the alien in question.

[539] See the judgments cited in the second addendum (A/CN.4/625/Add.2, para. 195).

[540] Revised draft article 8, reproduced in footnote 1268 to the report of the Commission on the work of its sixty-second session (A/65/10), read:

> **Expulsion in connection with extradition**
>
> Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article].

[541] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010.

compensation. The report highlighted the similarities between the positions of the Court and the developments discussed in the Special Rapporteur's reports.

228. The purpose of the restructured summary of the draft articles in the seventh report was to ensure greater clarity and consistency.

2. Summary of the debate

(a) General remarks

229. Several members stressed the complex and sensitive nature of the topic and the diversity of State practice. According to one view, it was important to bear in mind that some States were not convinced by the Commission's choice of the topic. Some doubts were expressed as to whether the Commission would be able to achieve a result that would meet with the general acceptance of States; according to one proposal, the Commission should re-evaluate the topic before embarking on a second reading. Scepticism was expressed about the likelihood that the draft articles could have a real impact on State practice. According to another view, however, the progress made in the treatment of the topic augured well for the submission to the General Assembly, in due course, of a set of draft articles adopted at first reading which would be sufficiently well balanced to meet with general acceptance.

230 While the Special Rapporteur was commended on his careful and systematic use of both older and recent sources from various regions around the world, some doubts were expressed as to the status of the proposed draft articles. According to one view, some of the draft articles could hardly be counted as codification or desirable progressive development of the law; in this regard, the Commission should indicate clearly whether it intended to identify the existing law or to propose new rules to States. More generally, the fact that, in identifying customary norms, due account must be taken of State practice, particularly contemporary practice was underscored.

231. Some members thought that the Commission should try to strike a balance between the right of a State to expel aliens and the limits imposed on that right by rules protecting the dignity and human rights of aliens. According to one opinion, the Commission should merely elaborate some well grounded, basic standards and guarantees, leaving a certain latitude for national policies. According to another view, the work of the Commission would be of greater practical relevance if the set of draft articles went beyond the existing rules of general international law and the provisions of conventions that enjoyed virtually universal acceptance, to address sensitive questions such as the propriety of placing aliens awaiting expulsion in detention, the possibility of appealing an expulsion decision and various aspects of cooperation between States. The point was made that better cooperation between the States concerned, including the State of nationality of the alien, would not only facilitate the expulsion process but also limit the duration of detention.

232. A view was expressed according to which some categories of aliens whose status is regulated by special norms, such as refugees, should not be covered in the draft articles, so as to avoid creating contradictory legal regimes. It was proposed that, with a view to progressive development, the Commission should draw on the rich experience of the European Union. According to another view, the practice and precedents derived from special regimes such as European Union law should be treated with caution.

233. As to the form of the final product, some members thought it doubtful that it lent itself to the framing of draft articles that might then be incorporated into a convention; the idea of drawing up draft guidelines or principles enunciating best practices was suggested.

According to other members, the Commission should continue to work towards the formulation of draft articles, also given the importance of the topic.

(b) Comments on the draft articles

234. Some members supported **draft article D1** on the return to the receiving State of the alien being expelled. It was said that it achieved a proper balance between the rights of the expelling State and respect for the alien's dignity and human rights. Doubts were expressed, however, as to whether the term "voluntary return" was appropriate when a person was ordered to leave a State's territory. Some members agreed with the Special Rapporteur that paragraphs 1 and 2 were codification, whereas paragraph 3 constituted progressive development. According to another viewpoint, however, it was doubtful whether paragraphs 1 and 2, which were based only on best practice or regional practice, amounted to codification.

235. Some members considered that paragraph 1 should be recast to prevent its being construed as encouragement to the use of undue pressure on the alien; it was argued that the verb "encourage" lacked legal precision and could pave the way to abuse. It was therefore proposed to specify that the expelling State should take the necessary measures to promote, or make possible, the alien's voluntary return. Another opinion was that it would be preferable to retain the wording proposed by the Special Rapporteur, for the term "measures" did not cover the whole range of means of persuasion that could be deployed to encourage voluntary departure. One suggestion was that the commentary should address the cost of transportation, including the possibility of providing financial assistance for an alien who did not have the means to pay for his or her departure. According to another point of view, paragraph 1 should be reworded to bring out the fact that voluntary departure was only one option, and that there was insufficient practice to make it obligatory for the expelling State to encourage an alien to comply voluntarily with an expulsion decision.

236. Regarding paragraph 2, some members proposed that the phrase "as far as possible" be deleted, for it could create the mistaken impression that, in some cases, there was no need to abide by international law; at most, mention could be made of the possibility of adopting such coercive measures as were needed to implement the expulsion decision, bearing in mind the behaviour of the person concerned. Another comment was that it would be necessary to examine the criteria for and limits to the use of physical constraint during the forcible implementation of an expulsion decision. Some members suggested the addition of a reference to the obligation to respect the expellee's dignity and human rights; another viewpoint was that it was sufficient to mention that obligation in the commentary, since the rules on the protection of human rights formed the subject of specific draft articles. While some members were in favour of the reference to the rules relating to air travel, others would prefer its deletion and the inclusion of an explanation in the commentary; the comment was made that other means of transport were also used for expulsion purposes, and that the rules on air travel were subsumed under the reference to the rules of international law.

237. Several members supported paragraph 3, at least in the context of progressive development. Some members nevertheless proposed the deletion of the reference to the expelling State's freedom to shorten the period of notice if there was reason to believe that the alien in question could abscond during that period; the vague, subjective nature of that freedom seemed to weaken paragraph 3. According to another view, while paragraph 3 undoubtedly reflected good practice, it should not perhaps be elevated to the status of a rule of law.

238. It was further proposed, with regard to the implementation of an expulsion decision, that the Commission consider not only the length of detention pending expulsion but also

the very idea of placing an alien in detention, at least when there were no real grounds of public order or national security. The formulation of a provision restricting placement in detention to situations where the alien did not comply voluntarily with the expulsion order might be contemplated.

239. While some members supported **draft article E1** on the State of destination of expelled aliens, others thought that it should be reconsidered in the light of State practice. The reversal of the order of paragraphs 2 and 3 was also suggested, because paragraphs 1 and 3 were closely linked.

240. With respect to paragraph 1, some members felt strongly that the State of nationality should take priority as the expelled alien's State of destination and stressed the importance of each person's right to return to his or her own country. Other members considered that the wording of paragraph 1 was too restrictive, since the idea that an alien could be expelled to a State other than the State of nationality, even when the latter could be identified, was acceptable. It was therefore proposed that a first paragraph be added, setting forth the right of an alien facing expulsion to be sent to the State of his or her choice, if that State was prepared to admit the alien, unless the expelling State had compelling reasons for refusing that choice. The suggestion was likewise made that a rule or guideline concerning the burden of proof and certain procedural guarantees when determining nationality be included. The case of stateless persons was also mentioned, since they had no State of nationality that was obliged to admit them.

241. The advisability of listing States of destination in paragraph 2 was questioned, and it was suggested that the list should not be formulated restrictively. Some members thought that it should be made clear that no State other than the expellee's State of nationality — such as the State of residence, the passport-issuing State and the State of embarkation mentioned in paragraph 2 — was under any obligation to admit the expellee to its territory. Another proposal was to recast paragraph 2 to give priority to the alien's wishes as to the chosen State of destination. Support was also voiced for a reference in the draft article to the notion of a "safe country", as some members considered it necessary to make it plain that the prohibition to expel an alien to a State where he or she might be subjected to torture or to other cruel, inhuman or degrading treatment extended to any State of destination and was not confined to the State of nationality. Another view was that it was superfluous to refer to that prohibition, since it was the subject of specific draft articles; a reference in the commentary would suffice. Another question raised was what might happen if an alien being expelled ran a real risk of his or her fundamental rights being violated in his or her State of nationality and if no other State agreed to admit him or her.

242. With regard to the formulation of paragraph 3, the significance and practical usefulness of the distinction drawn between a State "that has not consented" and a State "that refuses" to admit the alien were queried.

243. Some members supported **revised draft article F1**, which aimed at extending to the transit State the protection of the human rights of aliens subject to expulsion. It was, however, suggested that that provision be reworded to refer to the rules of *international law* on the protection of human rights and to make it plain that the transit State was not obliged to repeat the whole expulsion procedure. Other members considered that the wording of draft article F1 lacked clarity: on the one hand, by creating the false impression that the transit State was bound by rules of international law that were incumbent only upon the expelling State; on the other, by not specifying whether the obligations it envisaged were imposed on the expelling State, the transit State, or both. Some members endorsed the Special Rapporteur's opinion that the elaboration of a legal framework for transit arrangements for expelled aliens would go beyond the scope of the topic.

244. Several members supported **draft article G1** on protecting the property of aliens facing expulsion. It was suggested that reference be made to the protection of the property rights of aliens. It was further suggested that protection be widened to take in nationals who were unlawfully regarded by the expelling State as aliens. The possibility of distinguishing, in the context of protecting property, between aliens lawfully or unlawfully present in the territory of the expelling State was mentioned. In addition, it was proposed that an exception be made for cases where a court had found, after a fair trial, that certain property had been acquired illegally.

245. While some members considered that the content of paragraph 1, in which expulsion for the purpose of confiscation was prohibited, could be moved to the section of the draft articles concerning cases of prohibited expulsion, others preferred to deal with that aspect in draft article G1, even if it meant putting paragraph 2 first. According to one view, paragraph 1 was *lex ferenda*. According to another opinion, paragraph 1 should perhaps not be included, given the difficulty of assessing the expelling State's real intentions objectively.

246. Some members proposed the deletion, in paragraph 2, of the phrase "to the extent possible", which might overly weaken protection; it might be better, if need be, to stipulate which restrictions could be imposed on the property rights of the expelled alien. The scope of the reference to the obligation to return property was to be examined in order to ascertain whether it covered return by way of reparation for an unlawful act, or if it dealt more specifically with return of expropriated property. According to one view, the obligation of return, as set forth in paragraph 2, conflicted with the right of any State to expropriate the property of aliens provided certain conditions were met, in particular the payment of compensation. Attention was drawn to the fact that forms of reparation other than return could be involved when the alien's property had been lost or destroyed.

247. The view was expressed that the right of return to the expelling State in the event of unlawful expulsion, as set forth in **draft article H1**, stemmed from the principles of State responsibility for wrongful acts; another view was that the proclamation of that right constituted progressive development. Some members considered that the expression "right of readmission" was more suitable, for the word "return" seemed to apply more adequately to situations when a person was expelled from his or her own country. According to one proposal, it should be explicitly stated that the right of return meant that the expelling State was under an obligation to grant an alien the same status under immigration law that he or she had before expulsion. It was further noted that the right of return did not mean recognition of an acquired right to stay or reside in a country.

248. Some members considered that draft article H1 offered a balance between the right of an unlawfully expelled alien to return to the expelling State and the latter's legitimate interest in preserving public order and national security. It was suggested, however, that the notion of "mistaken grounds", which was not really legal terminology, be clarified by stating that the grounds in question were either attributable to an error of fact or of law, or were baseless.

249. Other members considered that draft article H1 was formulated too broadly. It was suggested that its scope be restricted to cases where an expulsion decision was annulled on substantive grounds, and not because of a procedural error. Some members also considered that the right of return could be recognized only where expulsion was contrary to a substantive rule of international law. Lastly, it was stated that only aliens legally present in the territory of the expelling State could benefit from the right of return in the event of unlawful expulsion.

250. Support was expressed for **draft article I1** on the responsibility of States in cases of unlawful expulsion. The use of the expression "unlawful expulsion" was preferred over that

of "illegal expulsion", so as to align the text with the wording of the articles on the responsibility of States for internationally wrongful acts. It was proposed that it be made clear that a State could be held responsible under draft article I1 only for violating a rule of international law. It was pointed out that, even if an expulsion decision was itself lawful, an expelling State could incur responsibility for acts such as ill-treatment of an alien when the decision was enforced. The view was expressed that the concept of particular damages for the interruption of the life plan should be treated with caution.

251. Some members supported **draft article J1** referring to diplomatic protection. It was nevertheless suggested that the fact that the provision applied only to expulsions that were unlawful under international law should be specified. It was proposed that reference be made to the right set forth in article 8 of the articles on diplomatic protection, as adopted by the Commission on second reading,[542] of a State to exercise diplomatic protection in respect of a stateless person or a refugee who is lawfully and habitually resident in its territory. According to another opinion, draft article J1 was not necessary: it would suffice to refer to diplomatic protection in the commentary to draft article I1, especially since draft article J1 disregarded the recommended practice for the exercise of diplomatic protection set out in article 19 of the above mentioned articles on diplomatic protection. In addition, some members suggested making reference, either in a separate draft article or in a "without prejudice" clause of draft article J1, to the individual complaint mechanisms available to expelled aliens under treaties on the protection of human rights; alternatively, it was suggested, this point could be dealt with in the commentary.

252. Some members supported **revised draft article 8** on expulsion in connection with extradition, subject to possible drafting amendments. Other members felt that the wording should be reviewed and clarified. Regret was expressed that the proposed text set forth no more than an obligation to respect ordinary conditions of expulsion, even though, in the situations it covered, an alien would be sent to a State with a view to serving out a sentence or undergoing trial there. Additional guarantees — of a fair trial in the requesting State, for example — should thus be identified. According to another point of view, the provision did not belong in the current set of draft articles, because it had more to do with extradition than with expulsion.

(c) The question of appeals against an expulsion decision

253. Some members agreed with the Special Rapporteur that it was unnecessary to formulate an additional draft article on appeals against an expulsion decision, as draft article C1 set out the right to challenge an expulsion decision, which seemed sufficient. The view was also expressed that considerable variations in national legislation and practice, as well as divergences among treaties, raised doubts as to whether customary rules governing appeals against an expulsion decision existed.

254. According to other members, as long as there appeared to be a customary basis for the right to appeal against an expulsion decision, a specific draft article on that subject should be formulated, albeit without mentioning particular legal remedies but instead describing in the commentary variations in State practice. It was maintained that, although international law did not recognize the right of judicial remedy, the right to an effective remedy derives from State practice and from human rights guarantees. It was further proposed that the Commission recommend that States grant the right to appeal against expulsion decisions also to those aliens who were unlawfully present in their territory,

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[542] *Official Documents of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 49. Articles subsequently annexed to General Assembly resolution 62/67 of 6 December 2007.

thereby going beyond what was required under article 13 of the International Covenant on Civil and Political Rights.[543] Mention was made of the risk of abuse associated with the invocation of the grounds of public order or national security to deny an alien the benefit of an appeal. Lastly, it was suggested that further thought be given to the distinction between an appeal against an expulsion decision and an appeal against expulsion itself.

255. Some members shared the Special Rapporteur's view that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. It was pointed out that to do so would be to hamper the effective exercise of the right of expulsion, and it was suggested that the Commission should work on better defining the notion of "safe country" rather than on formulating a rule on suspensive effect. It was also asserted that acknowledging suspensive effect entailed certain drawbacks in terms of legal uncertainty resulting from procedural delays.

256. According to other members, the Commission should formulate a draft article, if only as part of progressive development, envisaging the suspensive effect of an appeal against an expulsion decision, provided that there was no conflict with compelling reasons of national security. At the very least, the alien's right to seek a stay of the expulsion decision should be articulated, drawing on article 22, paragraph 4, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[544] Some members pointed out that an appeal against an expulsion decision lacking suspensive effect would not be effective, since aliens who had had to leave the country were likely to encounter economic obstacles to their return to the expelling State in the event that their appeal was successful. According to a more nuanced viewpoint, the Commission should find a formulation that offered the best compromise between the rights and interests of the expelling State and those of the expelled alien, respectively.

257. While recognizing the absence of a customary rule broadly providing for the suspensive effect of an appeal against an expulsion decision, the view was expressed that the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of torture or ill-treatment in the State of destination. In response to this proposal, it was pointed out that the obligation not to return a person to a State where he or she was exposed to such a risk existed in any event, irrespective of whether or not an appeal had been made against the expulsion decision and of whether or not the appeal had suspensive effect.

3. Concluding remarks of the Special Rapporteur

258. The Special Rapporteur was surprised to see that even now, some members were still questioning the nature of the work to be undertaken by the Commission, specifically, whether or not the topic lent itself to an exercise of codification and progressive development. That seemed all the more surprising given the abundance of State practice, as well as treaties and case law, both international and regional, on the subject of expulsion of aliens. Although it was premature to speculate on the form that the final product should take, the Special Rapporteur had a clear preference for the development of a set of draft articles rather than draft guidelines or guiding principles.

259. The Special Rapporteur had taken note of the proposed amendments to the draft articles, some of which could, if necessary, be dealt with by the Drafting Committee.

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[543] United Nations, *Treaty Series*, vol. 999, p. 171.
[544] *Ibid.*, vol. 2220, p. 3.

260. The Special Rapporteur remained convinced of the usefulness of draft article J1 on diplomatic protection, the scope of which had now been expanded to include the international protection of human rights, as demonstrated by the recent judgement rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case.[545] Draft article J1 was, of course, without prejudice to any individual complaint mechanism to which an alien might have recourse before an international body for the protection of his or her human rights.

261. The Special Rapporteur also remained convinced of the usefulness of a draft article on expulsion in connection with extradition. Without impinging on the subject of extradition, it was a matter of settling an issue that was on the dividing line between expulsion and extradition.

262. The Special Rapporteur maintained his belief that State practice had not converged sufficiently to warrant the formulation, if only as progressive development, of a provision on the suspensive effect of an appeal against an expulsion decision. That being so, the Commission was free to do so as a policy matter.

263. Lastly, it was hardly necessary to devote a draft article to cooperation, since it underpinned the whole of inter-State relations in time of peace.

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[545] See footnote 541 above.

Chapter IX
Protection of persons in the event of disasters

A. Introduction

264. The Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.

265. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

266. The Commission considered, at its sixty-first session in 2009, the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

267. At its 3029th meeting, on 31 July 2009, the Commission took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (A/CN.4/L.758).

268. At its sixty-second session (2010), the Commission adopted draft articles 1 to 5 at the 3057th meeting, held on 4 June 2010. The Commission further had before it the third report of the Special Rapporteur (A/CN.4/629) providing an overview of the views of States on the work undertaken by the Commission, a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State. Proposals for the following three further draft articles were made in the report: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State).

269. At its 3067th meeting, on 20 July 2010, the Commission took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee (A/CN.4/L.776).

B. Consideration of the topic at the present session

270. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1) providing an overview of the views of States on the work undertaken by the Commission thus far, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance as well as the right to offer assistance in the international community. Proposals for the following three further draft articles were made in the report: draft articles 10 (Duty of the affected State to seek assistance), 11 (Duty of the affected State not to arbitrarily withhold its consent) and 12 (Right to offer assistance).

271. The Commission considered the fourth report at its 3102nd to 3105th and 3107th meetings, from 11 to 14 and 18 July 2011.

272. At its 3107th meeting, on 18 July 2011, the Commission referred draft articles 10 to 12 to the Drafting Committee.

273. The Commission adopted the report of the Drafting Committee on draft articles 6 to 9, which had been considered at the Commission's previous session, at the 3102nd meeting, held on 11 July 2011. The Commission further adopted the report of the Drafting Committee on draft articles 10 and 11 at the 3116th meeting, held on 2 August 2011 (sect. C.1 below).[546]

274. At its 3122nd meeting, on 9 August 2011, the Commission adopted commentaries to draft articles 6 to 11 (sect. C.2 below).

1. Introduction by the Special Rapporteur of his fourth report

275. In introducing his fourth report, the Special Rapporteur recalled that he had, in his third report (A/CN.4/629), proposed a provision (contained in his proposal for draft article 8, paragraph 2), on the principle of the consent of the affected State. In his fourth report, he sought to build on that proposal. The broad concept of protection he had proposed since his first report called for the recognition of the tensions underlying the link between protection and the principles of respect for territorial sovereignty and non-interference in the internal affairs of the affected States.

276. Following the adoption of draft article 9 (the duty of the affected State to ensure the protection of persons on its territory), it was necessary to also consider the obligations of the same State when the magnitude of the disaster exceeded the limits of its response capacity, including the duty to seek assistance (draft article 10).[547] At the same time, receiving international relief assistance depended on the consent of the affected State, which could not be withheld arbitrarily (draft article 11).[548] The principles of sovereignty

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[546] The Drafting Committee was unable to complete its consideration of draft article 12, owing to a lack of time.

[547] Draft article 10 read as follows:

Duty of the affected State to seek assistance

The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.

[548] Draft article 11 read as follows:

Duty of the affected State not to arbitrarily withhold its consent

1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.

and non-interference, implied in the requirement of consent, were not to be considered in isolation but rather in light of the responsibilities of the State in exercising its sovereignty. Such obligations could be seen horizontally in the relationship of the State with the international community, as well as vertically in relation to the people in the State which had suffered the disaster and under its jurisdiction.

277. Whereas draft articles 10 and 11 dealt with the duties of the affected State, draft article 12[549] concerned the right of third parties, including States, international organizations or non-governmental organizations, to offer assistance. It served to acknowledge the legitimate interest of the international community to protect persons in the event of a disaster, which had been identified as far back as 1758 by Emer de Vattel. Since such interest of the international community was to be viewed in the broader context of the primary responsibility of the affected State to protect persons affected by disasters, the offer of assistance was an expression of solidarity, based on the principles of humanity, neutrality, impartiality and non-discrimination (draft article 6). There thus existed a complementarity between the primary responsibility of the affected State and the right of non-affected States to offer assistance. Such holistic approach, endorsed in, for example, the Hyogo Declaration of 2005 and other texts analysed in the report, had long been part of the evolution of international law, including international humanitarian law. It was pointed out that the interest of the international community in the protection of persons in the event of disasters could be effectively channelled through the timely intervention of international organizations and other humanitarian agents, adhering to the principles in draft article 6. Furthermore, the recognition of the importance of the contribution of non-governmental organizations, and their right to offer assistance, had been confirmed by recent practice. It was also recalled that the provision of assistance was subject to the consent of the affected State. Accordingly, the offer of assistance could not, in principle, be subject to the acceptance by the affected State of conditions that represented a limitation on its sovereignty. Draft article 12 simply asserted that offers of assistance were not, *ipso facto*, illegitimate, nor could they be construed as unlawful interference in the internal affairs of the affected State.

2. Summary of the debate on draft article 12

278. In accordance with the Commission's practice, the present report contains only a summary of the debate on draft article 12. It does not contain a summary of the debate on draft articles 10 and 11, as these draft articles and the commentaries thereto have been provisionally adopted at the current session.[550] A full account of the debate on draft articles 10, 11 and 12 is to be found in the relevant summary records,[551] which will be placed on the Commission's website in due course.[552]

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2. When an offer of assistance is extended pursuant to draft article 12 of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

[549] Draft article 12 read as follows:

Right to offer assistance

In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State.

[550] For the text of these draft articles and commentaries thereto, as provisionally adopted by the Commission, see sect. C.2 below.

[551] A/CN.4/SR.3102–3105 and 3107.

[552] See Chapter XIII below, paras. 403–405.

279. Support was expressed for draft article 12, and for the general proposition that offers of assistance should not be viewed as interference in the internal affairs of the affected State, subject to the condition that the assistance offered did not affect the sovereignty of the affected State as well as its primary role in the direction, control, coordination and supervision of such relief and assistance (draft article 9, paragraph 2). Agreement was also expressed with the Special Rapporteur's view that offering assistance in the international community is the practical manifestation of solidarity. At the same time, it was proposed that the provision more clearly define the circumstances where an affected State could reject offers of assistance and ensure that it has the appropriate freedom to do so. Hence, the view was expressed that the right to offer assistance should not extend to assistance to which conditions are attached that are unacceptable to the affected State. Furthermore, the assistance offered had to be consistent with the provisions of the draft article and, in particular, should not be offered or delivered on a discriminatory basis.

280. Some members pointed to the difficulties in referring to the "right" to offer assistance, especially when it came to non-governmental organizations, since it implied that non-governmental organizations enjoyed the same rights as States. It was suggested that the provision merely indicate that "third actors may offer assistance", thereby providing an authorization and not a right. Other suggestions included more clearly differentiating between assistance by non-affected States and intergovernmental organizations, and that provided by non-governmental organizations; as well as referring to non-governmental organizations "working with strictly humanitarian motives".

281. It was also suggested that the provision avoid a reference to legal "rights" since offers of assistance from the international community were typically extended as part of international cooperation as opposed to an assertion of rights. It was recalled that, in many cases, the mere expression of solidarity was equally important as offers of assistance. The view was also expressed that Article 2, paragraph 7, of the Charter of the United Nations limited the ability of the international community to offer assistance to affected States. In terms of a contrary view, the contemporary understanding of that provision of the Charter allowed for limitations and exceptions, especially in the context of the protection of human rights. It was also pointed out that draft article 12 should not be interpreted to imply permission to interfere in the internal affairs of the affected State: it merely reflected a right to offer assistance, which the affected State may refuse (subject to draft article 11).

282. In terms of a further view, draft article 12 was superfluous: the right of a State to offer assistance to another State that has faced a disaster followed from the notion of State sovereignty. In the absence of a specific rule of prohibition, all persons (both natural and legal) had the right to offer assistance to an affected State, and the provision, if it were retained, could be reformulated to reflect as much.

283. In terms of a further set of views, the provision could be recast as a positive duty on the international community to offer assistance. Other members were of the view that it would go too far to recognize a specific legal obligation on third States or organizations to give assistance. It was stated that the right of an affected State to seek international assistance was complemented by the duty on third States and organizations to *consider* such requests, and not necessarily the duty to accede to them. It was suggested that the right of the international community to offer assistance could be combined with an encouragement by the Commission to actually make such offers of assistance on the basis of the principles of cooperation and international solidarity.

3. Concluding remarks of the Special Rapporteur

284. The Special Rapporteur recalled some suggestions which had been made on the consideration of existing practice in the process of developing proposals for draft articles on

the present topic. He pointed out that by "practice" in the context of the progressive development of international law, the framers of the Statute of the International Law Commission had also contemplated that which was reflected in law which was insufficiently developed on a given subject. Nevertheless, the debate had left the impression that some members used the term "practice" in a much wider, almost colloquial sense, when focusing on concrete instances of what was characterized as "bad" as opposed to "good" practice. In his view, a more elaborate recounting of the specific practice of States and other actors in this area would not have yielded different conclusions to that drawn in his report, and he endorsed the position taken by some members that the Commission ought to pay careful attention to texts adopted by States and by other actors such as the International Federation of Red Cross and Red Crescent Societies, which represented a distillation of practice by those with significant experience in the field. He also recalled that the Commission had, in 2008, welcomed any information from States concerning their practice under this topic, including examples of domestic legislation. To date, the Commission had received submissions only from three States.

285. It was also pointed out that, in addition to a handful of multilateral, mainly regional, agreements and a somewhat larger number of bilateral treaties on mutual assistance, the bulk of the available material on what might be termed the law of disaster relief was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. The very notion of a disaster relief law was an emerging one whose consolidation would depend in great measure on the work of progressive development being carried out by the Commission. In so doing, it was incumbent on the Commission to give due consideration to resolutions of the General Assembly like resolution 46/182 which established the basic framework within which contemporary disaster relief activities were to be undertaken, as well as private codification efforts such as those undertaken by the Institute of International Law.

286. The Special Rapporteur recalled that the view had been expressed during the debate that his proposals had not adequately taken into account the concept of the "responsibility to protect". In that regard, he recalled that in his preliminary report (A/CN.4/598) he had taken the position that the "appropriateness of extending the concept of responsibility to protect and its relevance to the present topic both require careful consideration. Even if the responsibility to protect were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear".[553] This position was subsequently separately taken by the Secretary-General who, in his 2008 report on implementing the responsibility to protect (A/63/677), had indicated that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".[554] The Commission had subsequently endorsed this position both during its debate at its sixty-first session (2009),[555] and that held at the present session.

287. Reference was further made to a number of drafting suggestions raised during the plenary debate, and which were to be considered by the Drafting Committee.

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[553] At para. 55.

[554] At para. 10 (b).

[555] *Official Records of the General Assembly, Sixth-fourth Session, Supplement No. 10* (A/64/10), para. 164.

C. Text of the draft articles on the Protection of persons in the event of disasters provisionally adopted so far by the Commission

1. Text of the draft articles

288. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.[556]

Protection of persons in the event of disasters

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3
Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4
Relationship with international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Article 5
Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Article 6
Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

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[556] For the commentaries to draft articles 1 to 5, see *Official Records of the General Assembly, Sixty-fifth Session* (A/65/10), paragraph 331. For the commentaries to draft articles 6 to 11, see sect. C.2 below.

Article 7
Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8
Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9
Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 10
Duty of the affected State to seek assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Article 11
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-third session

289. The text of the draft articles, together with commentaries thereto, provisionally adopted by the Commission at its sixty-third session is reproduced below.

Article 6
Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Commentary

(1) Draft article 6 establishes the key humanitarian principles relevant to disaster response. The reference to "humanitarian" in the title of the draft article serves to indicate that the principles are considered by the Commission to constitute humanitarian principles that underlie disaster relief and assistance. On this basis the Commission did not find it necessary to determine whether these principles are also general principles of international

law, and noted that the principles do not apply to the exclusion of other relevant principles of international law. The Commission opted to enshrine the principles in the form of a draft article in recognition of their significance to the provision of disaster relief and assistance.

(2) The principles of humanity, neutrality and impartiality are core principles recognized as foundational to humanitarian assistance.[557] The principles are likewise fundamental to applicable laws in disaster relief efforts. By way of example, General Assembly resolution 46/182 notes that "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality, and impartiality".[558]

(3) The principle of humanity stands as the cornerstone of the protection of persons in international law. Situated as an element both of international humanitarian law and international human rights law, it informs the development of laws regarding the protection of persons in the event of disasters. Within the field of international humanitarian law, the principle is most clearly expressed in the requirement of humane treatment in common article 3 of the 1949 Geneva Conventions.[559] However, as the International Court of Justice affirmed in the *Corfu Channel* case (merits), elementary considerations of humanity are also general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[560] Pictet's commentary on the principles of the Red Cross attributes three elements to the principle of humanity: to prevent and alleviate suffering, to protect life and health, and to assure respect for the individual".[561] In the specific context of disaster relief, the Oslo Guidelines and the Mohonk Criteria affirm that the principle of humanity requires that "human suffering must be addressed wherever it is found".[562]

(4) While the principle of neutrality is rooted in the context of an armed conflict, the Commission determined that the principle is nonetheless applicable in other branches of the law. In the context of humanitarian assistance, the principle of neutrality has acquired a more specific meaning that is reflected in draft article 6. In this setting the principle requires that the provision of assistance be independent of any given political, religious, ethnic, or ideological context. The Oslo Guidelines and the Mohonk Criteria both affirm that the assistance should be provided "without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature".[563] As such the principle of neutrality indicates the apolitical nature of disaster response, and affirms that humanitarian activities may not be used for purposes other than responding to the disaster at hand. The principle ensures that the interest of those persons affected by disasters are the primary

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[557] See discussion in Secretariat Memorandum, A/CN.4/590, para. 11.

[558] General Assembly resolution 46/182 of 19 December 1991, annex, para. 2.

[559] See e.g. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, United Nations, *Treaty Series*, vol. 75, p. 31, article 3, paragraph 1 (noting that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria").

[560] *United Kingdom of Great Britain and Northern Ireland v. Albania* ("*Corfu Channel* case"), Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 22.

[561] Jean Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary* (Geneva, Henry Dunant Institute, 1979), pp. 21–27; also available from www.icrc.org.

[562] Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief – "Oslo Guidelines", revised on 1 November 2007, paragraph 20; J.M. Ebersole, "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies", *Human Rights Quarterly*, vol. 17, No. 1 (February 1995), p. 196.

[563] *Ibid.*

concern of the affected State and any other relevant actors in disaster response. Respect for the principle of neutrality is central to facilitating the achievement of an adequate and effective response to disasters, as outlined in draft article 2. Neutrality can therefore be considered an operational mechanism to implement the ideal of humanity.

(5) The principle of impartiality encompasses three principles: non-discrimination, proportionality, and impartiality proper. For reasons discussed below, the principle of non-discrimination is articulated by the Commission not merely as an element of draft article 6, but also as an autonomous principle of disaster response. Non-discrimination is directed towards the removal of objective grounds for discrimination between individuals, such that the provision of assistance to affected persons is guided solely by their needs. The principle of proportionality stipulates that the response to a disaster be proportionate to the scope of that disaster and the needs of affected persons. The principle also acts as a distributative mechanism, enabling the provision of assistance to be delivered with attention given to the most urgent needs. Impartiality proper reflects the principle that no subjective distinctions be drawn between individuals in the response to disasters. The Commentary to the First Protocol Additional to the Geneva Conventions thus conceptualizes impartiality as "a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering".[564] By way of example, the Draft International Guidelines for Humanitarian Assistance Operations provide that "[h]umanitarian assistance should be provided on an impartial basis without any adverse distinction to all persons in urgent need".[565] As a whole, the principle of impartiality requires that responses to disasters be directed towards full respect and fulfilment of the needs of those affected by disasters in a manner that gives priority to the needs of the particularly vulnerable.

(6) The principle of non-discrimination reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive, and include ethnic origin, sex, nationality, political opinions, race, and religion.[566] The Commission determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic at hand. Such an approach has also been taken by the Institute of International Law in its 2003 resolution on humanitarian assistance, which stipulates that the offer and distribution of humanitarian assistance shall occur "without any discrimination on prohibited grounds".[567] The Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance ("the IFRC Guidelines") likewise specify that assistance be provided to disaster-affected persons without "any

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[564] See Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), paragraph 2800–2801 (citing the "Proclamation of the Fundamental Principles of the Red Cross", adopted by resolution IX of the 20th International Conference of the Red Cross, Vienna 1965), and Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary* (see footnote 561), pp. 33–51.

[565] Peter MacAlister-Smith, Draft international guidelines for humanitarian assistance operations (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991), para. 6 (a).

[566] See *inter alia* the 1949 Geneva Conventions (see footnote 559), common art. 3, para. 1; Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948, art. 2; International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, art. 2, para. 1; International Covenant on Economic, Social and Cultural Rights, United Nations, *Treaty Series*, vol. 993, p. 3, art. 2, para. 2.

[567] Resolution adopted by the Institute of International Law on 2 September 2003 at the session held in Bruges, Belgium, article II, para. 3.

adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age, and political opinions)".[568]

(7) The Commission noted that the principle of non-discrimination is not to be taken as excluding the prospect of "positive discrimination" as appropriate. The phrase "while taking into account the needs of the particularly vulnerable" in draft article 6 reflects this position. The Commission considered the term "vulnerable" to encompass both groups and individuals. For this reason the neutral expression "vulnerable" was preferred to a reference either to "groups" or to "persons". The qualifier "particularly" was adopted by the Commission in recognition of the fact that those affected by disaster are by definition vulnerable. The specific phrasing of "particularly vulnerable" is drawn from article 4, paragraph 3 (a) of the IFRC Guidelines, which refer to the special needs of "women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses".[569] The qualifier is also mirrored in the Resolution on humanitarian assistance adopted by the Institute of International Law, which refers to the requirement to take into account the needs of the "most vulnerable".[570]

Article 7
Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Commentary

(1) Draft article 7 addresses the principle of human dignity in the context of disaster response. The Commission recognizes human dignity as the core principle that informs and underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle both for any action to be taken in the context of the provision of relief, and in the ongoing evolution of laws addressing disaster response.

(2) The principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. Reaffirmation of "the dignity and worth of the human person" is found in the preamble to the Charter of the United Nations, while the preamble to the 1948 Universal Declaration of Human Rights declares "recognition of the inherent dignity […] of all members of the human family is the foundation of freedom, justice and peace in the world". Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,[571] the International Covenant on Economic, Social and Cultural Rights,[572] the International Convention on the Elimination of all Forms of Racial Discrimination,[573] the Convention on the Elimination of All Forms of Discrimination Against Women,[574] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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[568] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance ("IFRC Guidelines"), 2007, art. 4, para. 2 (b).

[569] *Ibid.*, art. 4, para. 3 (a).

[570] Bruges Resolution on humanitarian assistance (see footnote 567), art. II, para. 3.

[571] United Nations, *Treaty Series*, vol. 999, p. 171, preambular paragraphs; art. 10, para. 1.

[572] *Ibid.*, vol. 993, p. 3, preambular paragraphs; art. 13, para. 1.

[573] *Ibid.*, vol. 660, p. 195, preambular paragraphs.

[574] *Ibid.*, vol. 1249, p. 13, preambular paragraphs.

Punishment,[575] and the Convention on the Rights of the Child.[576] The principle is central, although not limited to, the field of international humanitarian law. The concept of personal dignity is recognized in common article 3, paragraph 1 (c) of the 1949 Geneva Conventions,[577] articles 75 and 85 of Protocol I,[578] and article 4 of Protocol II.[579]

(3) The concept of human dignity also lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The IFRC Guidelines state that "[a]ssisting actors and their personnel should […] respect the human dignity of disaster-affected persons at all times".[580] General Assembly resolution 45/100 holds that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[581] The Institute of International Law likewise reflects that a failure to provide humanitarian assistance to those affected by disasters constitutes "an offence to human dignity".[582]

(4) The opening phrase of draft article 7, "[i]n responding to disasters", reflects the substantive context in which the provision applies. While it is anticipated that the phrase is primarily directed towards the response and recovery phase, the reference should be read in light of paragraph (5) of the commentary to draft article 2.[583] The Commission chose the term "responding to" over the more generic "in their response", so as to give a sense of the continuing nature of the obligation to respect and protect the human dignity of affected persons throughout the duration of the response period. The precise formulation of the principle adopted by the Commission, namely the "inherent dignity of the human person", is drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights, and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. This formulation has also been adopted in instruments such as Convention on the Rights of the Child,[584] and the American Convention on Human Rights.[585]

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[575] *Ibid.*, vol. 1465, p. 85, preambular paragraph.

[576] *Ibid.*, vol. 1577, p. 3, preambular paragraphs; arts. 23, para. 1; 28, para. 2; 37; 39 and 40.

[577] The 1949 Geneva Conventions (footnote 559), common art. 3, para. 1 (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment").

[578] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, art. 75, para. 2 (b), (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault"); art. 85, para. 4 (c) (noting that when committed wilfully and in violation of the Conventions or the Protocol, "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" are regarded as grave breaches of the Protocol).

[579] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art. 4, para. 2 (e) (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault").

[580] IFRC Guidelines (see footnote 568), art. 4, para. 1.

[581] General Assembly resolution 45/100 of 14 December 1990, preambular paragraph.

[582] Bruges Resolution on humanitarian assistance (see footnote 567), art. II, para. 1.

[583] *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10* (A/65/10), para. 331.

[584] Convention on the Rights of the Child (see footnote 576), art. 37 (c) (noting *inter alia* that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person").

[585] American Convention on Human Rights, Organization of American States, *Treaty Series*, No. 36, United Nations, *Treaty Series*, vol. 1144, p. 123, art. 5, para. 2 (noting *inter alia* that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person").

(5) The phrase "States, competent intergovernmental organizations and relevant non-governmental organizations" provides an indication of the actors to which the provision is addressed. In its reference to "States", the Commission recognizes the role played both by affected States and assisting States in disaster response activities. As a whole, the phrase accords with recognition that much of the activity in the field of disaster response occurs through organs of intergovernmental organizations, non-governmental organizations, and other non-State entities such as the IFRC.[586] The Commission determined that the current formulation maintained consistency with draft article 5, as opposed to a more general reference to "other relevant actors".

(6) The Commission adopted the phrase "respect and protect" as a formula that accords with contemporary doctrine and jurisprudence in international human rights law. The formula is used in a number of instruments that relate to disaster relief, including the Oslo Guidelines,[587] the Mohonk Criteria,[588] the Guiding Principles on Internal Displacement,[589] and the Guiding Principles on the Right to Humanitarian Assistance.[590] In conjunction, the terms "respect and protect" connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to maintain human dignity. By way of example, the duty of protection requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity. The Commission considered that an obligation to "protect" should be commensurate with the legal obligations borne by the respective actors addressed in the provision. An affected State therefore holds the primary role in the protection of human dignity, by virtue of its primary role in the direction, control, coordination and supervision of disaster relief and assistance, reflected in draft article 9, paragraph 2.

Article 8
Human rights

Persons affected by disasters are entitled to respect for their human rights.

Commentary

(1) Draft article 8 seeks to reflect the broad entitlement to human rights protection held by those persons affected by disasters. A corresponding obligation on relevant actors to protect such rights is implicit in the draft article. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 7, reinforced by the close proximity of the two draft articles.

(2) The general reference to "human rights" encompasses human rights obligations expressed in relevant international agreements and reflected in customary international law,

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[586] See *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), Annex C, para. 28.

[587] Oslo Guidelines (see footnote 562), para. 20 (noting that "[t]he dignity and rights of all victims must be respected and protected").

[588] The Mohonk Criteria (see footnote 562), p. 196 ("noting that "[t]he dignity and rights of all victims must be respected and protected").

[589] E/CN.4/1998/53/Add.2, annex, principle 26 (noting *inter alia* that "[p]ersons engaged in humanitarian assistance, their transport and supplies shall be respected and protected").

[590] Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the International Institute of Humanitarian Law in April 1993, principle 10 (noting that "[h]umanitarian assistance can, if appropriate, be made available by way of 'humanitarian corridors' which should be respected and protected by competent authorities of the parties involved and if necessary by the United Nations authority").

as well as assertions of best practices for the protection of human rights included in non-binding texts on the international level. The Commission decided not to limit the provision to obligations "set out in the relevant international agreements". The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to, or qualify those obligations.

(3) The Commission considered that the reference to "human rights" incorporates both the substantive rights and limitations that exist in the sphere of international human rights law. In particular, the provision contemplates an affected State's right of derogation where recognized under existing international human rights law.

(4) As clarified in the commentary to draft article 1, at paragraph (2), the scope *ratione personae* of the draft articles encompasses the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance in the context of disasters. The Commission recognizes that the scope and content of an obligation to protect the human rights of those persons affected by disasters will vary considerably between these actors. The neutral phrasing adopted by the Commission should be read in light of an understanding that distinct obligations will be held by affected States, assisting States, and various other assisting actors respectively.

(5) The reference at the beginning of draft article 8 to "persons affected by disasters" reaffirms the context in which the draft articles apply, and is not to be understood as implying that persons not affected by a disaster do not similarly enjoy such rights.

Article 9
Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Commentary

(1) Draft article 9 is addressed towards an affected State in the context of the protection of persons in the event of a disaster upon its territory. Paragraph 1 of draft article 9 reflects the obligation of an affected State to protect persons and provide disaster relief in accordance with international law. Paragraph 2 of draft article 9 affirms the primary role held by an affected State in the response to a disaster upon its territory. As a whole, draft article 9 is premised on the core principles of sovereignty and non-intervention respectively, as enshrined in the Charter of the United Nations,[591] and recognized in numerous international instruments.[592] In the context of disaster relief, General Assembly

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[591] Charter of the United Nations, Art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its members"); Art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII").

[592] See e.g. the Declaration on Principles on International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex (noting *inter alia* that "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community", that "[t]he use of force to deprive peoples of their national identity constitutes a violation of their

resolution 46/182 affirms that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations".[593]

(2) Paragraph 1 of draft article 9 affirms that the duty held by an affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory stems from its sovereignty. This conception of a bond between sovereign rights and concomitant duties upon a State was expressed by Judge Álvarez in a separate opinion in the *Corfu Channel* case:

> "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them."[594]

The Commission considered several formulations for this concept, including the phrases "in the exercise of its sovereignty" and "in the exercise of its sovereign rights and duties", before settling on the present text. The modifying phrase "by virtue of its sovereignty" emphasizes that the affected State, which benefits from the principle of non-intervention, is the party that holds the duty to protect persons located within its territory. The Commission determined that the term "duty" was more appropriate than that of "responsibility". It considered that use of the term "responsibility" could give rise to confusion given its use as a term of art elsewhere in the Commission's work.

(3) Paragraph 2 of draft article 9 further reflects the primary role held by a State in disaster response. This position is rooted in the core principles of State sovereignty and non-intervention at international law. For the reasons expressed above, the Commission decided to adopt the word "role" rather than "responsibility" in articulating the position of an affected State. The adoption of the term "role" was informed by General Assembly resolution 46/182, which affirms *inter alia* that an affected State "has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory".[595] Use of the word "role" rather than "responsibility" was also considered to allow a margin of appreciation to States in the coordination of disaster response activities. Language implying an obligation upon States to direct or control disaster response activities may conversely be restrictive on States that preferred to take a more limited role in disaster response coordination or faced a situation of limited resources.

(4) The primacy of an affected State is also informed by the long-standing recognition in international law that the government of a State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies. The affirmation in paragraph 2 that an affected State holds the primary role in the direction, control, coordination and supervision of disaster relief and assistance should be read in concert with

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inalienable rights and of the principle of non-intervention", and that "States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention"). The International Court of Justice has held that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations": *Corfu Channel* case (see footnote 560), p. 35.

[593] General Assembly resolution 46/182 (see footnote 558), annex, para. 3.

[594] *Corfu Channel* case, Separate Opinion by Judge Álvarez (see footnote 560), p. 43. See also the opinion expressed by Max Huber, Arbitrator, in the *Island of Palmas* case, Award of 4 April 1928, *R.I.A.A.*, vol. II, p. 839:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States …"

[595] General Assembly resolution 46/182 (see footnote 558), annex, para. 4.

the duty of cooperation outlined in draft article 5. In this context, draft article 9, paragraph 2, affirms that an affected State holds the primary position in cooperative relationships with other relevant actors that are contemplated in draft article 5.

(5) Reference to the "direction, control, coordination and supervision" of disaster relief and assistance is drawn from article 4, paragraph 8 of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations.[596] The Commission considered that the Tampere Convention formula was gaining general currency in the field of disaster relief and assistance and represented a more contemporary construction.[597] The formula reflects that a State exercises final control over the manner in which relief operations are carried out in accordance with international law.

(6) The Commission departed from the Tampere Convention in deciding not to include a reference to "national law" in its articulation of the primary role of an affected State. In the context of the Tampere Convention, the reference to national law indicates that appropriate coordination requires consistency with an affected State's domestic law. The Commission decided not to include this reference in light of the fact that the internal law of an affected State may not in all cases regulate or provide for the primary position of a State in disaster response situations.

Article 10
Duty of the affected State to seek assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Commentary

(1) Draft article 10 addresses the particular situation in which a disaster exceeds a State's national response capacity. In these circumstances an affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations. The duty expounded in draft article 10 is a specification of draft article 9 and draft article 5. Paragraph 1 of draft article 9 stipulates that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The draft article affirms the central position of obligations owed by States towards persons within its borders. The duty to cooperate also underlies an affected State's duty to the extent that a disaster exceeds its national response capacity. Draft article 5 affirms that the duty to cooperate is incumbent upon not only potential assisting States, but also affected States where such cooperation is appropriate. The

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[596] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, United Nations, *Treaty Series*, vol. 2296, p. 5 (noting that "[n]othing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory").

[597] See e.g. the ASEAN Agreement on Disaster Management and Emergency Response, (26 July 2005), ASEAN Documents Series 2005, p. 157, art. 3, para. 2 (noting that "[t]he Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory"); the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, United Nations, *Treaty Series*, vol. 1457, p. 133, art. 3 (a) (noting *inter alia* that unless otherwise agreed, "the overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State").

Commission considers that such cooperation is both appropriate and required to the extent that an affected State's national capacity is exceeded. In these circumstances, seeking assistance is additionally an element of the fulfilment of an affected State's primary responsibilities under international human rights instruments and customary international law. The existence of the duty to seek assistance as set out in draft article 10 was supported by a majority of the members of the Commission, but opposed by others.

(2) The draft article stresses that a duty to seek assistance arises only to the extent that the national response capacity of an affected State is exceeded. As noted by the Special Rapporteur in his second report, not all disasters are considered to overwhelm a nation's response capacity.[598] The Commission therefore considers the present draft article only to be applicable to a subset of disasters as defined in draft article 3 of the present draft articles.

(3) It is to be noted that in the debate within the Commission concerning the formulation of draft article 10, some members of the Commission opposed the idea that affected States are under, or should be placed under, a legal duty to seek external assistance in cases of disaster. This opposition was premised on the view that, as it currently stands, international law does not place any such binding duty upon affected States. The members of the Commission who shared this perspective indicated that draft article 10 should be worded in hortatory terms to the effect that affected States "should" seek external assistance in cases where a disaster exceeds national response capacity.

(4) The Commission adopted the phrase "to the extent that" in order to clarify that the national response capacity of an affected State is rarely conceptualized as sufficient or insufficient in absolute terms. An affected State's national capacity may be exceeded in relation to one aspect of disaster relief operations, although the State remains capable of undertaking other operations. As a whole, the phrase "[t]o the extent that a disaster exceeds its national response capacity" encompasses the situation in which a disaster appears likely to exceed an affected State's national response capacity. This flexible and proactive approach is in line with the fundamental purpose of the draft articles as expressed in draft article 2. The approach facilitates an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights. Recognition of the duty upon States in these circumstances reflects the Commission's concern to enable the provision of timely and effective disaster relief assistance.

(5) The Commission considers that the duty to seek assistance in draft article 10 derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources are inadequate to meet protection needs. While this may occur also in the absence of any disaster, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.[599] The Commission notes that the Human Rights Committee has held that a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect and fulfil the substantive right.[600] The right to life is non-derogable under the International Covenant on Civil and Political Rights, even in the event of a "public emergency threatening the life of a nation"[601] – which has been recognized to include a "natural catastrophe" by the Human

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[598] A/CN.4/615, para. 46.

[599] See A/CN.4/598, para. 26.

[600] See Human Rights Committee, general comment No. 6 (The Right to Life), 30 April 1982, para. 5.

[601] International Covenant on Civil and Political Rights, 1966, (see footnote 566), art. 6 (1).

Rights Committee in General Comment No. 29.[602] The International Covenant on Economic, Social and Cultural Rights states that in pursuance of the right to food:

> "[t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[603]

The Committee on Economic, Social and Cultural Rights noted, in General Comment No. 12 on the Right to Adequate Food, that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

> "the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. [...] A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food".[604]

The Commission therefore notes that "appropriate steps" to be taken by a State include seeking international assistance where domestic conditions are such that the right to food cannot be realized. It is relevant that this step is engaged where a State itself asserts that it is unable to carry out its obligations.

(6) Specific references to the protection of rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child,[605] and the Convention on the Rights of Persons with Disabilities.[606] Under article 23 of the African Charter on the Rights and Welfare of the Child, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster" are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

> "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."[607]

The Commission considers that the phrase "all necessary measures" may encompass recourse to possible assistance from the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel* case (merits) that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[608] Draft article 6 affirms the core position of the principle of humanity in disaster response.

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[602] Human Rights Committee, general comment No. 29 (States of Emergency (art. 4)), 24 July 2001, para. 5.

[603] International Covenant on Economic, Social and Cultural Rights, 1966, (see footnote 566), art. 11.

[604] Committee on Economic, Social and Cultural Rights, general comment No. 12 (The right to adequate food (art. 11)), 1999, para. 17.

[605] African Charter on the Rights and Welfare of the Child, 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

[606] United Nations Convention on the Rights of Persons with Disabilities, G.A. resolution 61/106 of 13 December 2006.

[607] *Ibid.*, art. 11.

(7) The Commission considers that a duty to "seek" assistance is more appropriate than a duty to "request" assistance in the context of draft article 10. The Commission derives this formulation from the duty outlined in a resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003, which notes:

> "[w]henever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States."[609]

Similarly, the international disaster response law guidelines of the International Federation of the Red Cross and Red Crescent Societies hold that:

> "[i]f an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."[610]

In addition, the guiding principles annexed to General Assembly resolution 46/182 also appear to support an implicit duty on affected States to engage in international cooperation where an emergency exceeds its response capacity:

> "The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws."[611]

(8) The alternate formulation of "request" is incorporated in the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines), which note that "[i]f international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximise its effectiveness".[612] The Commission considers that a "request" of assistance carries an implication that an affected State's consent is granted upon acceptance of that request by a third State. In contrast, the Commission is of the view that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid. The term "seek" entails the proactive initiation by an affected State of a process through which agreement may be reached. Draft article 10 therefore places a duty upon affected States to take positive steps actively to seek out assistance to the extent that a disaster exceeds its national response capacity.

(9) The Commission considers that the Government of an affected State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. The Commission considers that the assessment of the severity of a

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[608] *Corfu Channel* case (see footnote 560) p. 22 (noting that "[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...").

[609] Bruges Resolution on humanitarian assistance (see footnote 567), art. III, para. 3.

[610] IFRC Guidelines (see footnote 568), guideline 3 (2).

[611] G.A. resolution 46/182 (see footnote 558), annex, para. 5.

[612] Oslo Guidelines (see footnote 562), para. 58.

disaster by an affected State must be carried out in good faith. The principle of good faith is expounded in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[613] which stipulates that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations",[614] "obligations under the generally recognized principles and rules of international law",[615] and "obligations under international agreements valid under the generally recognized principles and rules of international law".[616] A good faith assessment of the severity of a disaster is an element of an affected State's duty, by virtue of its sovereignty, to ensure the protection of persons and provision of disaster relief and assistance on its territory pursuant to draft article 9, paragraph 1.

(10) The phrase "as appropriate" was adopted by the Commission to emphasize the discretionary power of an affected State to choose from among various States, the United Nations, competent intergovernmental organizations, and relevant non-governmental organizations the assistance that is most appropriate to its specific needs. The term further reflects that the duty to seek assistance does not imply that a State is obliged to seek assistance from every source listed in draft article 10. The phrase "as appropriate" therefore reinforces the fact that an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance, as outlined in draft article 9, paragraph 2.

(11) The existence of a duty to seek assistance to the extent that national capacity is exceeded should not be taken to imply that the Commission does not encourage affected States to seek assistance in disaster situations of a lesser magnitude. The Commission considers cooperation in the provision of assistance at all stages of disaster relief to be central to the facilitation of an adequate and effective response to disasters, and a practical manifestation of the principle of solidarity. Even if an affected State is capable and willing to provide the required assistance, cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons.

Article 11
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Commentary

(1) Draft article 11 addresses consent of an affected State to the provision of external assistance. As a whole, draft article 11 creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 of draft article 11 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall

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[613] G.A. resolution 2625 (XXV) (see footnote 592), annex.

[614] *Ibid.*

[615] *Ibid.*

[616] *Ibid.*

not be withheld arbitrarily, while paragraph 3 of the draft article places a duty upon an affected State to make its decision regarding an offer of assistance known whenever possible.

(2) The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[617] The Tampere Convention stipulates that "[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party",[618] while the ASEAN Agreement on Disaster Management notes that "external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party".[619] Recognition of the requirement of State consent to the provision of external assistance comports with the recognition in draft article 9, paragraph 2, that an affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory.

(3) The recognition, in paragraph 2, that an affected State's right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 9, which affirms that an affected State, "by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory". On the other hand, some members of the Commission resisted the idea that the dual nature of sovereignty necessarily meant that the Commission should support the approach taken in draft article 11, paragraph 2. For these members of the Commission, draft article 11, paragraph 2, should not be drafted to include the mandatory "shall"; rather, the provision should indicate that "Consent to external assistance should not be withheld arbitrarily."

(4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory in the event of a disaster is aimed at preserving the life and dignity of the victims of the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory.[620] The Human Rights Committee has interpreted the right to life as embodied in article 6 of the International Covenant of Civil and Political Rights to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right.[621] An offer of assistance that is met with refusal might thus under certain conditions constitute a violation of the right to life. The General Assembly reaffirmed in resolutions 43/131 and 45/100 that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[622]

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[617] G.A. resolution 46/182 (see footnote 558), annex, para. 3.

[618] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998 (see footnote 596 above), art. 4, para. 5.

[619] ASEAN Agreement on Disaster Management and Emergency Response, 2005 (see footnote 597), art. 3, para. 1.

[620] See International Covenant on Civil and Political Rights (see footnote 566 above), art. 6, para. 1.

[621] Human Rights Committee, general comment No. 6 (The Right to Life) (see footnote 600 above), para. 5: "The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."

[622] G.A. resolution 43/131 of 8 December 1988, eighth preambular paragraph; G.A. resolution 45/100 (see footnote 581 above), sixth preambular paragraph.

(5) Recognition that an affected State's discretion regarding consent is not unlimited is reflected in the Guiding Principles on Internal Displacement.[623] The Guiding Principles, which have been welcomed by the former Commission on Human Rights and the General Assembly in unanimously adopted resolutions and described by the Secretary-General as "the basic international norm for protection" of internally displaced persons, note:[624]

> "[c]onsent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance".[625]

The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. Its 1989 resolution entitled "The Protection of Human Rights and the Principle of Non-intervention in the Internal Affairs of States", article 5, paragraph 2, states in the authoritative French text:

> "Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires."[626]

In 2003 the Institute of International Law revisited this issue, stipulating in its Bruges Resolution under the heading "Duty of affected States not arbitrarily to reject a *bona fide* offer of humanitarian assistance":

> "Affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare."[627]

(6) The term "withheld" implies a temporal element to the determination of arbitrariness. Both the refusal of assistance, and the failure of an affected State to make a decision known in accordance with draft article 11, paragraph 3 within a reasonable time frame, may be deemed arbitrary. This view is reflected in General Assembly resolutions 43/131[628] and 45/100,[629] which each include the following preambular paragraphs:

> "Concerned about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,
>
> Convinced that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number."

The 2000 Framework Convention on Civil Defence Assistance likewise reflects among the principles that States parties undertake to respect in terms of providing assistance in the event of a disaster that "[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time".[630]

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[623] E/CN.4/1998/53/Add.2.

[624] A/59/2005, para. 210.

[625] E/CN.4/1998/53/Add.2, Principle 25, para. 2.

[626] Resolution adopted by the Institute of International Law, 13 September 1989 at the session held in Santiago de Compostela, art. 5, para. 2. Included in the French text is mandatory language, while the English translation reads: "States in whose territories these emergency situations exist *should* not arbitrarily reject such offers of humanitarian assistance." The explanatory text "où la population est gravement menacée dans sa vie ou sa santé" is drawn from art. 5, para. 1 of that resolution.

[627] Bruges Resolution on humanitarian assistance (footnote 567 above), art. VIII, para. 1.

[628] G.A. resolution 43/131 (see footnote 622 above), ninth and tenth preambular paragraphs.

[629] G.A. resolution 45/100 (see footnote 581 above), eighth and ninth preambular paragraphs.

(7) The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.

(8) An affected State's discretion to determine the most appropriate form of assistance is an aspect of its primary role in the direction, control, coordination and supervision of disaster relief and assistance under draft article 9, paragraph 2. This discretion must be exercised in good faith in accordance with an affected State's international obligations.[631] The Commission nonetheless encourages affected States to give reasons where consent to assistance is withheld. The provision of reasons is fundamental to establishing the good faith of an affected State's decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.

(9) In paragraph 3, the Commission opted for the phrase "make its decision regarding the offer known" to give the maximum flexibility to affected States in determining how best to respond to offers of assistance. It was recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States in disaster situations. The Commission considers the current phrase to encompass a wide range of possible means of response, including a general publication of the affected State's decision regarding all offers of assistance. The paragraph applies both to situations where an affected State accepts assistance and situations in which an affected State withholds its consent.

(10) The Commission considers the phrase "whenever possible" to have a very restricted scope. The phrase directs attention to extreme situations where a State is incapable of forming a view regarding consent due to the lack of a functioning government or circumstances of equal incapacity. The Commission is further of the view that an affected State is capable of making its decision known in the manner it feels most appropriate absent the exceptional circumstances outlined in this paragraph.

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[630] Framework Convention on Civil Defence Assistance, 2000, United Nations, *Treaty Series*, vol. 2172, p. 213, art. 3, para. (e).

[631] See e.g. G.A. resolution 2625 (XXV) (footnote 592), annex, para. 1 (noting *inter alia* that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations", "obligations under the generally recognized principles and rules of international law", and "obligations under international agreements valid under the generally recognized principles and rules of international law").

Chapter X
The obligation to extradite or prosecute (*aut dedere aut judicare*)

A. Introduction

290. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[632]

291. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur.[633]

292. At its sixtieth session (2008), the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session.[634] At the sixty-first session (2009), an open ended Working Group was established, and from its discussions, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was prepared.[635] At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its chairman, was chaired by Mr. Enrique Candioti.[636]

B. Consideration of the topic at the present session

293. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/648). The Commission considered the report at its 3111th to 3113th and 3115th meetings from 25 to 27 and 29 July 2011.

1. Introduction by the Special Rapporteur of his fourth report

294. After recalling the background to the topic and its consideration thus far including discussions of the Sixth Committee during the sixty-fifth session of the General Assembly, the fourth report — building upon previous reports — sought to address the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom.

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[632] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty ninth Session, Supplement No. 10* (A/59/10), paras. 362–363).

[633] A/CN.4/571 (preliminary report); A/CN.4/585 and Corr.1 (second report); and A/CN.4/603 (third report).

[634] At its 2988th meeting, on 31 July 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315).

[635] For the proposed general framework prepared by the Working Group, see *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[636] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the temporary Chairman of the Working Group (*ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 337–340).

295. The Special Rapporteur, following suggestions in the 2010 Working Group, sought to underpin the consideration of the topic around the duty to cooperate in the fight against impunity, noting, more generally, that the duty to cooperate was well established as a principle of international law and can be found in numerous international instruments.[637] In international criminal law, the duty to cooperate had a positive overtone as exemplified in the Preamble of the Rome Statute of the International Criminal Court of 1998, containing an affirmation that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", and, to contribute to the prevention of such crimes, a determination "to put an end to impunity for the perpetrators of these crimes".

296. The fight against impunity for the perpetrators of serious crimes of concern to the international community as a whole was a fundamental policy achievable on the one hand through the establishment of international criminal tribunals and on the other the exercise of jurisdiction by national courts. The Special Rapporteur stated that the duty to cooperate in the fight against impunity had already been considered as a customary rule by some States and in the doctrine.

297. To underscore that the duty to cooperate was overarching in the appreciation of the obligation to extradite or prosecute, the Special Rapporteur proposed to replace the former article 2 (Use of terms)[638] with a new draft article 2 on the duty to cooperate.[639]

298. The Special Rapporteur reviewed the various sources of the obligation to extradite or prosecute, considering treaties first, drawing attention to a variety of possible classifications and differentiation, available in the doctrine, distinguishing such treaties.[640]

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[637] See for example Article 1 (3) of the Charter of the United Nations; the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[638] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 318 and corresponding footnote. See also A/CN.4/603, para. 121.

[639] Draft article 2 read as follows:

Duty to cooperate

1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international court and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*).

[640] In M. Cherif Bassiouni and Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law, (substantive/procedural); Amnesty International, Universal Jurisdiction: The duty of States to enact and implement legislation (London, September 2001), (chronological); Amnesty International, International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare) (London, February 2009), (territorial); Claire Mitchel, Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law (Geneva, The Graduate Institute of International and Development Studies, 2009) (Multilateral treaties/Extradition treaties); and Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat (A/CN.4/630) (chronological and substantive criteria: (a) the 1929 International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model; (b) the 1949 Geneva Conventions and the 1977 Additional Protocol I; (c) regional conventions on extradition; and (d) the Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention) and other conventions following the same

299. He recalled that he had previously proposed a draft article 3[641] dealing with treaties as a source of the obligation to extradite or prosecute. In light of the variety and differentiation of provisions concerning the obligation, the Special Rapporteur considered it useful to propose the addition of another paragraph to draft article 3 on Treaty as a source of the obligation to extradite or prosecute.[642]

300. The Special Rapporteur also analysed the obligation *aut dedere aut judicare* as a rule of customary international law, noting that its acceptance was gaining prominence at least in respect of certain crimes in doctrinal writings of some legal scholars and was being acknowledged by some delegations in the debates of the Sixth Committee particularly during the sixty-fourth session of the General Assembly (2009), while some others had called for further study by the Commission. The Special Rapporteur also pointed to written and oral pleadings of States before the International Court of Justice, in particular in respect of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.[643]

301. The Special Rapporteur also addressed the relevance of norms of *jus cogens* as a source of the obligation to extradite or prosecute as suggested by some commentators, noting that such connection arose from the assertion that there were certain prohibited acts which if committed would constitute serious breaches of obligations under peremptory norms of general international law and that consequently gave rise to an obligation on all States to prosecute or entertain civil suits against the perpetrators of such crimes when found on their territory. Moreover, States were prohibited from committing serious crimes of concern to the international community as a whole, and any international agreement between States to facilitate commission of such crimes would be void *ab initio*.

302. The Special Rapporteur noted that although there was no doubt that there were certain crimes in the realm of international criminal law whose prohibition had reached the status of *jus cogens* (such as the prohibition against torture), whether the obligation *aut dedere aut judicare* attendant to such peremptory norms also possessed the characteristics of *jus cogens* was a matter giving rise to difference of views in the doctrine.

303. Commenting on the categories of crimes associated with the obligation *aut dedere aut judicare*, the Special Rapporteur, observing that it was difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, suggested that focus should rather be on identifying those particular categories of crimes which seemed to create such an obligation, on account, *inter alia*, that they were serious crimes of concern to the international community as a whole. He alluded to the importance of differentiating between ordinary criminal offences — criminalized under national laws of States — and heinous crimes variously described as international crimes,

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model). See also Amnesty International, Universal Jurisdiction, UN General Assembly should support this essential international justice tool, (London, 2010) (dealing mainly with the question of universal jurisdiction).

[641] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 319 and corresponding footnote. See also A/CN.4/603, para. 123.

[642] Draft article 3, as amended, read as follows:

> **Treaty as a source of the obligation to extradite or prosecute**
>
> 1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.
>
> 2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law.

[643] See for instance International Court of Justice, document CR.2009/08, 6 April 2009 (www.icj-cij.org/docket/files/144/15119.pdf), pp. 23–25 and (www.icj-cij.org/docket/files/144/15054.pdf).

crimes of international concern, grave breaches, crimes against international humanitarian law, etc., and paying particular attention to the latter, partly because they possessed an international or had a special grave character.[644] Among such crimes were: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

304. Having considered the various issues implicated, the Special Rapporteur proposed draft article 4 on International custom as a source of the obligation *aut dedere aut judicare*.[645]

305. In proposing the draft article, he noted that the list of crimes covered by paragraph 2 of that article was still open and subject to further consideration and discussion.

2. Summary of the debate

(a) General comments

306. The Special Rapporteur was commended for helpfully embarking on an analysis of issues that substantively had a bearing on the topic. Members nevertheless acknowledged the difficulties presented by the topic, particularly as it had implications for other aspects of the law, including questions of prosecutorial discretion, questions of asylum, the law on extradition, the immunity of States officials from criminal jurisdiction, peremptory norms of international law, as well as universal jurisdiction, thereby posing problems in terms of the direction to be taken and what needed to be achieved. The methodology to be adopted and the general approach to be taken were thus crucial in fleshing out the issues relevant to the topic.

307. In this connection, attention was drawn to the valuable work of the Working Group on *aut dedere aut judicare* in 2009 and 2010 and the continuing relevance of the proposed 2009 general framework for the Commission's consideration of the topic, prepared by the Working Group. Although the Fourth report was useful in focusing on the treaties and custom as sources of the obligation, and indeed the consideration of the sources of the obligation remained a key aspect of the topic, the report had not fully addressed the issues so as to allow the Commission draw informed conclusions on the direction to be taken on the topic. In particular, concerns were expressed about the draft articles as proposed and the analysis on which they were based. It was noted that the methodology of the Special Rapporteur in treating the main sources of international law, namely treaties and customary law separately and proposing two separate draft articles therefore was conceptually problematic; the focus should be on the obligation to extradite or prosecute and how treaties and custom evidenced the rule rather than on treaties or custom as the "source" of the

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[644] See for example article 9 of the Draft Code of Crimes against the Peace and Security of Mankind and the article 5 of the 1998 Rome Statute of the International Criminal Court.

[645] Draft article 4 read as follows:

> **International custom as a source of the obligation *aut dedere aut iudicare***
>
> 1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.
>
> 2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].
>
> 3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (jus cogens), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.

obligation; there was no need for a draft article to demonstrate that there was a rule in a treaty or under custom. Indeed, there were other sources that would help to inform the nature, scope and content of the obligation.

(b) Draft article 2: Duty to cooperate

308. Some members doubted the relevance of the draft article as a whole, with a suggestion being made that it be transformed into hortatory preambular language. It was not entirely clear why it was subject of a self-standing obligation; the formulation was question-begging, not supportable in its current form, and should be reconsidered once the implications of the duty to cooperate in the context of the topic were more clearly elaborated; more particularly, there ought to be an explanation of an explicit relationship between *aut dedere aut judicare* and the duty of States to cooperate with each other, as opposed to the duty to cooperate and the fight against impunity.

309. Some other members however underlined the importance of reflecting in some manner the duty to cooperate, or an obligation to cooperate as preferred by some, in the fight against impunity, it being recalled that this aspect was highlighted in the 2009 general framework and by the 2010 Working Group. It was stressed that the duty to cooperate was already well established across various fields of international law. The key question to be answered was what it meant in the context of international criminal cooperation, assessing how far the political goal of the fight against impunity had crystallized into a specific legal obligation. Since the duty did not exist in a vacuum what seemed essential was to provide a context for it in relation to the topic, as well as content in aspects such as prevention, prosecution, judicial assistance and law enforcement.

310. Commenting of the draft article as such, while acknowledging the emphasis on the "fight against impunity" in paragraph 1, it was pointed out by some members that the phrase was imprecise, suggestive of preambular language than clear legal text for the operative part.

311. It was however pointed out that slogan-sounding language like fight against impunity was commonly and easily understood, and the use of simplified language has the advantage of making draft articles of the Commission accessible.

312. Some other members were also of the view that paragraph 1 was formulated cautiously and the use of qualifiers established unnecessary thresholds.

313. It was also noted that it was not clear why international courts and tribunals would be implicated as paragraph 1 seemed to suggest since the core aspects of the topic affected principally inter-State relations, including domestic courts. The point was nevertheless made that paragraph 1 could in fact be separated to deal with interstate cooperation and then with cooperation with international courts and tribunals, as well as cooperation with the United Nations, on the basis of article 89 of Additional Protocol I.

314. Some members were also of the view that the phrase "crimes and offences of international concern," in the paragraph was ambiguous as to offer any guidance on the type of crimes covered by the present topic, there was need for clarity, bearing in mind the principle *nullum crimen sine lege*.

315. For paragraph 2, it was noted that the phrase "wherever and whenever appropriate" had the potential of being construed widely, with negative consequences for inter-State relations. Moreover, its whole meaning was obscure, as at one level it seemed to denote a free standing obligation to extradite or prosecute, without stating much as to what it entailed. However, some members were more favourable to the more general open-endedness implied by the language, considering it appropriate for a text that was intended to make propositions of general application.

(c) Draft article 3: Treaty as a source of the obligation to extradite or prosecute

316. A suggestion was made to delete the draft article in its entirety. Its paragraph 1 was considered superfluous; it was not evident how a reflection of *pacta sunt servanda* in the text helped to elucidate issues concerning the topic.

317. To some members, paragraph 2, although currently unclear, raised possibilities for further enquiry. In providing that "[p]articular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party", it was not apparent which State party was being referred to and it also raised the possibility that a State would invoke its internal law to justify non-compliance with an international obligation. Moreover, the reference to "general principles of international criminal law" seemed vague. If anything, it was these principles which had to be fleshed out for implementation. For example, it was suggested it might be useful to make an assessment whether prosecutorial discretion was a general principle of criminal law relevant to the topic. The point was also made that draft article ought to be addressing matters concerning both the conditions for extradition, including available limitations, and the conditions for prosecution, according them different treatment as they were different legal concepts.

318. It was also noted that while the Special Rapporteur had alluded to a variety of classification of treaties and differentiation of treaty provisions in the doctrine in his report in support of the draft article, there was no further analysis or application of such classification. It would have been helpful, for instance, to explore further whether such classification and differentiation provided some possible understanding of the qualifications, conditions, requirements, and possible exceptions to extradition or prosecution provided for in the various treaties, including such aspects of extradition law concerning "double criminality", the rule of "specialty", as well as issues concerning the political offence exception and non-extradition of nationals.

319. The classification could also possibility have helped to show that many treaties which contain the obligation to extradite or prosecute articulated a general principle of law, or customary rule or whether it had a bearing on the application of the obligation in respect of certain "core crimes".

(d) Draft article 4: International custom as a source of the obligation *aut dedere aut judicare*

320. Some members viewed the present article problematic since it was not supported by the Special Rapporteur's own analysis, having himself admitted that it was rather difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, and its drafting was rather tentative.

321. Although paragraph 1 seemed unobjectionable in its terms, it presented a tautology and seemed to add little to the question of the obligation *aut dedere aut judicare*.

322. At the same time, it was recognized that the draft article seemed to address an issue central to the topic. In particular, paragraph 2, together with paragraph 3, had the potential to be elaborated into an important rule, yet as presently formulated, it was vague, obscure and the drafting was weak. It was underlined that one of the key issues to be grappled with was the distinction between "core crimes" for the purposes of the topic and other crimes. The Special Rapporteur was encouraged to undertake a more detailed study of the State practice and *opinio juris* and offer a firm view on which certain serious crimes of concern to the international community as a whole gave rise to an obligation to extradite or prosecute. Such an analysis could also consider such issues as whether the accumulation of treaties containing an obligation to extradite or prosecute meant that that States accepted that there was a customary rule, or whether it meant that States believed that they were

derogating from customary law. In making such a detailed analysis, there was no need for the Special Rapporteur to await the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite*.

323. Some members also recalled that the issues being raised had already been canvassed in the Commission in particular in relation to its work culminating in the adoption of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. Draft article 9 thereof on the obligation to extradite and prosecute imposes an obligation on the State Party in the territory of which an individual alleged to have committed a crime of genocide, crimes against humanity, crimes against United Nations and associated personnel or war crimes is found shall extradite or prosecute that individual. Draft article 3 and 4 could be reformulated, as a matter of progressive development, along the lines of draft article 9 of the Draft Code.

324. It was thus suggested that there was a need to proceed cautiously, with an appropriate differentiation in the analysis between different categories of crimes, noting in that regard that some crimes may be subject to universal jurisdiction but not necessarily to the obligation to extradite or prosecute. Similarly, grave breaches were subject to the obligation *aut dedere aut judicare* but not all war crimes are subject to it.

325. In the first place, it might be easier to make an assessment of the customary nature of the obligation in respect of certain identified "core crimes" as opposed to finding a more general obligation. It was also recalled that crimes under international law constituted the most serious crimes that were of concern to the international community as a whole. Moreover, the current topic was inextricably linked to universal jurisdiction. Indeed, the current topic was artificially separated from the broader subject of universal jurisdiction, and the obligation to extradite or prosecute would not be implicated without jurisdiction. In respect of the Draft Code it was recognised that national courts would exercise jurisdiction in regard to draft article 9 under the principle of universal jurisdiction. Accordingly, further work could not meaningfully be done without addressing universal jurisdiction and the type of crimes implicated by it. In this context, it was suggested that in future reports the Special Rapporteur could consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction in order to assess whether this relationship had any bearing on draft articles to be prepared on the topic. Moreover, the suggestion was made that present topic could be expanded to cover universal jurisdiction, taking into account the views of the Sixth Committee following a question in Chapter III of the report of the Commission at the present session.

326. It was noted that the meaning of paragraph 3 was not entirely clear and was question begging; its mandatory language did not correspond to the doubts that the Special Rapporteur expresses in his report. For example, it was not clear whether it was intended to set out the obligation to extradite or prosecute as a peremptory norm or whether it is intended to include in the obligation, crimes that violate such norms. The issues sought to be covered by the paragraph, including the still tenuous link between crimes prohibited as constituting breaches of peremptory norms and the procedural consequences that ensue in relation to the obligation to extradite or prosecute, simply required to be teased out in an extensive analysis by the Special Rapporteur, building significantly on the comments made in his report on the views expressed in the doctrine.

(e) Future work

327. As to the future work on the present topic, the view was expressed that there was an inherent difficulty in the topic. It was even suggested that the Commission should not be hesitant to reflect on the possibility of suspending or terminating the consideration of the topic, as in the past it had done so with respect to other topics. Some other members,

however, noted that the topic remained a viable and useful project for the Commission to pursue. Moreover, States were interested in the topic and were keen for progress. It was also recalled that this aspect had been a subject of discussion in the past, and that the resulting preparation of the 2009 general framework pointed to the viability of the topic. Recognizing that the Sixth Committee was dealing with a related item on the scope and application of the principle of universal jurisdiction, it was also suggested that this matter could be combined with the topic on the *aut dedere aut judicare* obligation. It was recognized, however, that there were different views on this matter in the Sixth Committee.

3. Concluding remarks of the Special Rapporteur

328. The Special Rapporteur expressed his appreciation to members for their constructive, frank and critical comments, which would only serve as an encouragement to engage further in the complex issues brought about by the topic.

329. He agreed that the topic required an in-depth analysis of international norms — conventional and customary — as well as national regulations, which — especially in recent years — were developing and changing significantly. On the proposed draft articles, he took note of the useful comments and suggestions made for improvement and assured the Commission that they will be taken into account in the future work. He however affirmed the importance of having a draft article on the duty to cooperate. He also stressed the importance of treaties as a source of the obligation, noting that extensive State practice could be an indication of the existence of a developing rule in customary law. Thus, if States became party to a large number of international treaties, all of which with a variation of the obligation to extradite or prosecute, there would seem to be strong evidence that States were willing to be bound by the obligation to extradite or prosecute and pointing to the emergence of the obligation as custom.

330. The Special Rapporteur also recognized fully and supported the necessity of more precise identification of "core crimes", for the purposes of the topic, viewing such an approach as more realistic and promising than an attempt to determine the existence of the obligation as a general customary rule. On the relationship between the obligation and *jus cogens*, he noted that even when the obligation to extradite or prosecute derived from the peremptory norm of general international law, such an obligation does not acquire automatically the status of a *jus cogens* norm. Clearly, the relationship between the obligation and jus cogens norms would require more elaboration in the future work of the Commission.

331. As regards the possible expansion of the topic to cover universal jurisdiction, the Special Rapporteur recalled that in his preliminary report he had already suggested to continue a joint analysis of the present topic together with universal jurisdiction, but the Commission and the Sixth Committee were not favourably disposed to the idea. He however conceded that with increased attention to the question of universal jurisdiction such consideration might be inevitable in the future.

332. He associated himself with the general view in the Commission that there was no need to suspend the consideration of the topic, noting that any suspension could create a false impression that the Commission considered the topic be inappropriate or not sufficiently mature for codification, or indeed that there were other reasons for not proceeding further.

Chapter XI
Treaties over time

A. Introduction

333. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[646] At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[647] At the sixty-second session (2010), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction.[648]

B. Consideration of the topic at the present session

334. At the present session, the Study Group on Treaties over time was reconstituted again under the chairmanship of Mr. Georg Nolte.

335. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation of the Study Group that the request for information included in Chapter III of the report of the Commission on the work of its sixty-second session (2010) be reiterated in Chapter III of the Commission's report on its work at the current session.[649]

1. Discussions of the Study Group

336. The Study Group held five meetings, on 25 May, on 13, 21 and 27 July, and on 2 August 2011.

337. The Study Group first took up the remainder of the work on the introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction. Accordingly, members discussed the section of the introductory report relating to a possible modification of a treaty by subsequent agreements and practice and the relation of subsequent agreements and practice to formal amendment procedures. As with respect to the other parts of the introductory report and

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[646] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353). For the syllabus of the topic, see *ibid.*, Annex A. The General Assembly, in para. 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[647] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 220–226.

[648] *Ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344–354.

[649] See below, para. 343.

following a proposal by the Chairman, the Study Group considered that no conclusions should be drawn, at this stage, on the matters covered in the introductory report.

338. The Chairman noted that the following additional documents had been submitted for consideration by the Study Group: the second report by the Chairman on the "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice", a paper by Mr. Murase entitled "The Pathology of "Evolutionary" Interpretations: GATT Article XX's Application to Trade and the Environment" and a paper prepared by Mr. Petrič on subsequent agreements and practice concerning a particular boundary treaty. The Study Group discussed the paper by Mr. Murase in connection with the pertinent point addressed in the Chairman's second report, and decided to postpone the consideration of the paper prepared by Mr. Petrič until it would discuss issues of subsequent agreement and subsequent practice that are unrelated to judicial or quasi-judicial proceedings.

339. The Chairman's second report covers the jurisprudence under certain international economic regimes (World Trade Organization, Iran-US Claims Tribunal, International Centre for the Settlement of Investment Disputes tribunals and North American Free Trade Area tribunals), international human rights regimes (European Court of Human Rights, Inter-American Court of Human Rights, and Human Rights Committee under the International Covenant on Civil and Political Rights), and other regimes (International Tribunal for the Law of the Sea, International Criminal Court, International Criminal Tribunals for the former Yugoslavia and Rwanda, and Court of Justice of the European Union). The report explains why those regimes are covered and not others.

340. The Study Group considered the second report on the basis of the twenty "General conclusions" contained therein. Discussions focused on the following aspects: reliance by adjudicatory bodies under special regimes on the general rule of treaty interpretation; the extent to which the special nature of certain treaties — notably human rights treaties and treaties in the field of international criminal law — might affect the approach of the relevant adjudicatory bodies to treaty interpretation; different emphasis placed by adjudicatory bodies on the various means of treaty interpretation (e.g. more text-oriented or more purpose-oriented approaches to treaty interpretation in comparison with more conventional approaches); general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role assigned by various adjudicatory bodies to subsequent practice among the various means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time from which a practice may regarded as "subsequent"; possible authors of relevant subsequent practice; as well as evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. Due to lack of time, the members of Study Group could only discuss eleven of the conclusions contained in the second report. In the light of these discussions in the Study Group, the Chairman reformulated the text of what have now become his nine preliminary conclusions (see section 3. below).

341. The Study Group agreed that those preliminary conclusions by its Chairman would have to be revisited and expanded in the light of other reports on additional aspects of the topic and of the discussions thereon.

2. Future work and request for information

342. The Study Group also discussed the future work with regard to this topic. It was expected that, during the sixty-fourth session (2012), the discussion of the second report prepared by the Chairman would be completed, to be followed by a third phase, namely the analysis of the practice of States that is unrelated to judicial and quasi-judicial proceedings. This should be done on the basis of a further report on this topic. The Study Group expected that the work on the topic would, as originally envisaged, be concluded during the

next quinquennium and result in conclusions on the basis of a repertory of practice. The Study Group also discussed the possibility of modifying the working method with respect to the topic so as to follow the procedure involving the appointment by the Commission of a Special Rapporteur. It came to the conclusion that this possibility should be considered during the next session by the newly elected membership.

343. At its meeting on 2 August 2011, the Study Group examined the possibility that the request for information from Governments which was included in Chapter III of the Commission's report on the work of its sixty-second session (2010) be reiterated. It was generally felt in the Study Group that more information provided by Governments in relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that Chapter III of this year's report include a section reiterating the request for information on the topic "Treaties over time".

3. Preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group

344. The nine preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group, are as follows:

(1) General rule on treaty interpretation

The provisions contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), either as an applicable treaty provision or as a reflection of customary international law, are recognized by the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply.[650]

(2) Approaches to interpretation

Regardless of their recognition of the general rule set forth in Article 31 VCLT as the basis for the interpretation of treaties, different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein. Three broad approaches can be distinguished:

> Conventional – Like the International Court of Justice, most adjudicatory bodies (Iran-US Claims Tribunal, ICSID tribunals, ITLOS, and the international criminal courts and tribunals) have followed approaches which typically take all means of interpretation of Article 31 VCLT into account without making noticeably more or less use of certain means of interpretation.
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> Text-oriented – Panel and Appellate Body Reports of the World Trade Organisation (WTO) have in many cases put a certain emphasis on the text of the treaty (ordinary or special meaning of the terms of the agreement) and have been reluctant to emphasize purposive interpretation.[651] This approach seems to have to do, *inter alia,*

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[650] Whereas the European Court of Justice (ECJ) has not explicitly invoked the general rule contained in Article 31 VCLT when interpreting the Founding Treaties of the European Union, it has, however, invoked and applied this rule when interpreting treaties between the EU and non-member States; see e.g. Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Judgment of 25 February 2010, paras. 41–43.

[651] E.g. Brazil – Aircraft, Article 21.5 Appellate Body Report, 21 July 2000, WT/DS46/AB/RW, at para. 45.

with a particular need for certainty and with the technical character of many provisions in WTO-related agreements.

Purpose-oriented – The regional human rights courts, as well as the Human Rights Committee under the International Covenant on Civil and Political Rights (HRC), have in many cases emphasized the object and purpose.[652] This approach seems to have to do, *inter alia*, with the character of substantive provisions of human rights treaties which deal with the personal rights of individuals in an evolving society.

The reasons why some adjudicatory bodies often put a certain emphasis on the text, and certain others more on the object and purpose, may lie not only in the particular subject-matters of the treaty obligations concerned, but may also be due to their drafting and other factors, including possibly the age of the treaty regime, and the procedure in which the adjudicatory body operates. It is not necessary to determine the exact degree to which such factors influence the interpretative approach of the respective adjudicatory body. It is, however, useful to bear the different broad approaches in mind when assessing the role which subsequent agreements and subsequent practice play for different adjudicatory bodies.

(3) Interpretation of treaties on human rights and international criminal law

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) emphasize the special nature of the human rights treaties which they apply, and they affirm that this special nature affects their approach to interpretation.[653] The International Criminal Court and other criminal tribunals (ICTY, ICTR) apply certain special rules of interpretation which are derived from general principles of criminal law and human rights.[654] However, neither the regional human rights courts nor the international criminal courts and tribunals call into question the applicability of the general rule contained in Article 31 VCLT as a basis for their treaty interpretation. The other adjudicatory bodies reviewed do not claim that the respective treaty which they apply justifies a special approach to its interpretation.

(4) Recognition in principle of subsequent agreements and subsequent practice as means of interpretation

All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) VCLT are a means of interpretation which they should take into account when they interpret and apply treaties.[655]

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[652] E.g. ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161, para. 87; IACtHR, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, para. 58.

[653] ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, Series A No. 25, para. 239; *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, para. 111; IACtHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982, Series A No. 2, para. 19.

[654] See articles 21 (3) and 22 (2) of the ICC Statute.

[655] The ECJ, when interpreting and applying the Founding Treaties of the European Union, has generally refrained from taking subsequent practice of the parties into account; it has, however, done so when interpreting and applying treaties between the EU and third States, see e.g. Case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli*, [1977] ECR 2261, para. 18; Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, [1994] ECR I-3087, paras. 43 and 50.

(5) Concept of subsequent practice as a means of interpretation

Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ("concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation")[656] combines the element of "practice" ("sequence of acts or pronouncements") with the requirement of agreement ("concordant, common") as provided for in article 31 (3) (b) VCLT (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of "practice" as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).[657]

(6) Identification of the role of a subsequent agreement or a subsequent practice as a means of interpretation

Like other means of interpretation, subsequent agreements and subsequent practice are mostly used by adjudicatory bodies as one among several such means in any particular decision. It is therefore rare that adjudicatory bodies declare that a particular subsequent practice or a subsequent agreement has played a determinative role for the outcome of a decision.[658] It appears, however, often possible to identify whether a subsequent agreement or a particular subsequent practice has played an important or a minor role in the reasoning of a particular decision.

Most adjudicatory bodies make use of subsequent practice as a means of interpretation. Subsequent practice plays a less important role for adjudicatory bodies which are either more text-oriented (WTO Appellate Body) or more purpose-oriented (IACtHR). The ECtHR places more emphasis on subsequent practice by referring to the common legal standards among member states of the Council of Europe.[659]

(7) Evolutionary interpretation and subsequent practice

Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense.[660] The text-oriented WTO Appellate Body has only occasionally expressly undertaken an evolutionary interpretation.[661] Among the human rights treaty bodies the ECtHR has frequently employed an evolutionary interpretation that was explicitly guided by subsequent practice,[662] whereas the IACtHR and the HRC have hardly relied on subsequent practice. This may to be due to the fact that the ECtHR can refer to a comparatively close common level of restrictions among the member States of the Council of Europe. ITLOS seems to engage in evolutionary interpretation along the lines of some of the jurisprudence of the ICJ.[663]

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[656] *Japan – Alcoholic Beverages II*, Report of the Appellate Body, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Section E.

[657] E.g. *The M/V "SAIGA" (No. 1) Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, (Judgment)* ITLOS Case No. 1 (4 December 1997), paras. 57–59; see also *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia), I.C.J. Reports 1999*, p. 1096, para. 80.

[658] But see e.g. *The Islamic Republic of Iran* and *The United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), September 9, 2004, 2004 WL 2210709 (Iran-U.S.Cl.Trib.), paras. 109–117 and 134.

[659] See e.g. *Demir and Baykara v. Turkey* [GC], No. 34503/97, §§ 52, 76, 85; *A. v. the United Kingdom*, No. 35373/97, § 83, ECHR 2002-X.

[660] See also Preliminary Conclusions 5 and 9.

[661] *US – Shrimp*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para. 130.

[662] See note 659.

(8) Rare invocation of subsequent agreements

So far, the adjudicatory bodies reviewed have rarely relied on subsequent agreements in the (narrow) sense of article 31 (3) (a) VCLT. This may be due, in part, to the character of certain treaty obligations, in particular of human rights treaties, substantial parts of which may not lend themselves to subsequent agreements by governments.

Certain decisions which plenary organs or States parties take according to a treaty, such as the "Elements of Crime" pursuant to article 9 of the ICC Statute or the "FTC Note 2001" in the context of NAFTA,[664] if adopted unanimously, may have an effect similar to subsequent agreements in the sense of article 31 (3) (a) VCLT.

(9) Possible authors of relevant subsequent practice

Relevant subsequent practice can consist of acts of all State organs (executive, legislative, and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include "social practice" as far as it is reflected in State practice.[665]

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[663] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, ITLOS Case No. 16 (1 February 2011), paras. 117 and 211.

[664] See the reference and discussion in *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, http://www.state.gov/documents/organization/16586.pdf, para. 177.

[665] See *Christine Goodwin v. the United Kingdom*, No. 28957/95, paras. 84–91, ECHR 2002-VI.

Chapter XII
The Most-Favoured-Nation clause

A. Introduction

345. The Commission, at its sixtieth session (2008), decided to include the topic "The Most Favoured-Nation clause" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[666]

346. A Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[667] and reconstituted at the sixty-second session (2010), under the same co-chairmanship.[668]

B. Consideration of the topic at the present session

347. At the present session, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera.

348. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Co-Chairmen of the Study Group.

1. Discussions of the Study Group

349. The Study Group held 4 meetings on 1st June, 20 July and 4 August 2011.

350. In 2010 the Study Group decided, in an effort to advance its work, to try to identify further the normative content of the MFN clauses in the field of investment, and to undertake a further analysis of the case law, including the role of arbitrators, factors that explain different approaches to interpreting MFN provisions, the divergences, and the steps taken by States in response to the case law. At the present session, the Study Group had before it an informal document, in tabular form, identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision that was being interpreted.

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[666] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 354). For the syllabus of the topic, see *ibid.*, Annex B. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[667] At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause (*ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 211–216). The Study Group considered, *inter alia*, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning, in particular, the scope of MFN clauses and their interpretation and application.

[668] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 359–373). The Study Group considered and reviewed the various papers prepared on the basis of the 2009 framework to serve as a road map of future work, and agreed upon a programme of work for 2010.

351. It also had before it a working paper on the "Interpretation and Application of MFN Clauses in Investment Agreements" prepared by Donald McRae. The working paper built upon the prior study on the "The MFN clause and the *Maffezini* case" by Rohan Perera,[669] by attempting to identify the factors that had been taken into account by the tribunals in reaching their decisions in order to assess whether these threw any light on the divergences that exist in the case law, with the objective of identifying categories of factors that had been invoked throughout the cases and to assess their relative significance in the interpretation and application of MFN clauses. In this regard, the working paper considered the various uses for which MFN clauses had been invoked in investment disputes, focusing primarily on the use of MFN clauses to obtain a substantive benefit provided for in the bilateral investment treaty between the respondent State and a third State; and the use of MFN clauses to obtain more favourable dispute settlement provisions than are provided for in the bilateral investment agreement under which the claim was being brought.[670]

352. It also looked into the considerations that had played a part in investment tribunal decisions, dwelling on the *source* of the right to MFN treatment, as well as its *scope*. In terms of scope, it was noted that there were many ways in which investment tribunals had framed the application of the *ejusdem generis* principle, and even within some decisions different approaches had been taken. These included (a) drawing a distinction between substance and procedure (jurisdiction); (b) following a *treaty interpretation* approach, whether by interpreting MFN provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (c) adopting a *conflict of treaty provisions* approach, whereby tribunals take into account the fact that the matter sought to be incorporated into the treaty has already been covered, in a different way, in the basic treaty itself; and (d) considering the *practice* of the parties as a means to ascertain the intention of the parties regarding the scope of the MFN clause. Moreover, the working paper considered the question, albeit not explicitly dealt with by the tribunals as a factor, whether the *type of claim* being made had had an influence on the willingness of tribunals to incorporate other provisions by means of an MFN clause, as well as the *limits of the application of the MFN*, including the "public policy" exceptions set out in *Maffezini*.

353. In the main, the working paper concluded that an examination of the decisions of investment tribunals revealed that there was no consistent approach in the reasoning of tribunals that permitted the use of MFN to incorporate dispute settlement provisions. There was also little consistency in the reasoning of those tribunals that had rejected the use of MFN to incorporate such provisions. There was a two-step process involved in deciding whether an MFN clause could be used to incorporate dispute settlement provisions into the basic treaty. The first was to decide, explicitly or implicitly, whether in principle MFN clauses covered dispute settlement provisions, and the second was to interpret the MFN provision in question to see whether it applied in fact to dispute settlement provisions. These approaches were not always explicit, and in some cases, tribunals had said that their approach was one of treaty interpretation, appearing to ignore the first step.

354. The Study Group held a wide-ranging discussion on the basis of the working paper and a framework of questions prepared to provide an overview of issues that may need to be considered in the context of the overall work of the Study Group: ranging from strictly legal considerations to wider policy-oriented aspects, including whether a liberal interpretation of the scope of MFN clauses had the potential to upset the overall equilibrium

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[669] For a summary, see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 366–368.

[670] It may also be invoked to obtain a benefit granted to the investors or the investments of a third State under the domestic law or legislation of the country against which the claim is made (respondent State).

of an investment agreement between the protection of the investor and its investment and the necessary policy space of a host State.

355. The Study Group affirmed the general understanding that the source of the right to MFN treatment was the basic treaty and not the third-party treaty;[671] MFN clauses were not an exception to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning MFN seemed to be how the scope of the right to MFN treatment was to be determined, that is to say what expressly or impliedly fell "within the limits of the subject-matter of the clause".

356. It thus tracked the ways in which the *ejusdem generis* question had been framed particularly through the invocation of the distinction between substantive and procedural (jurisdictional) provisions. Where an MFN clause expressly included dispute settlement procedures or expressly excluded them, there was no need for further interpretation. Interpretation, however, was necessary in situations where the intention of the parties in relation to the applicability or not of the MFN clause to the dispute settlement mechanism was not expressly stated or could not clearly be ascertained, a situation common in many BIT's, which had open textured provisions. The Study Group took into account other recent developments, including the issuance of the sequel to the UNCTAD Series on Issues in International Investment Agreements II, *Most-Favoured-Nation Treatment*[672] reflecting, *inter alia*, the reaction by States entering into investment agreements following *Maffezini*, showing a tendency to state expressly that the MFN clause applied or did not apply to dispute settlement procedures.

357. It also considered the recent decision in *Impregilo S.p.A. v. Argentine Republic*,[673] in particular the concurring and dissenting opinion of Professor Brigitte Stern, Arbitrator, which *inter alia* argues that an MFN clause cannot apply to dispute settlement because of a core reason intimately linked with the essence of international law itself: there is no automatic assimilation of substantive rights and the jurisdictional means to enforce them, evidencing a difference between the qualifying conditions for access to the substantive rights and the substantive rights themselves, and the qualifying conditions for access to the jurisdictional means and the exercise of jurisdiction itself.[674] It was also noted that there were differences of opinion in the doctrine as to the correct approach, with some commentators taking the position that there was no convincing reason for distinguishing between substantive provisions and dispute settlement, while some others viewed the interpretation of MFN provisions as a jurisdictional matter where the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.

358. It was recognized that implicit in the various decisions appeared to be a philosophical position about whether MFN clauses in principle covered dispute settlement provisions. The starting assumption in one scenario was that the MFN clause can include procedural rights, while in the other it was that the MFN clause did not include procedural rights. It was noted that on the whole, the conundrum was in the fact that there was no systematic approach to interpretation, one that was uniform across tribunals; different

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[671] *Anglo-Iranian Oil Co. Case (Preliminary objection), 22 July 1952, I.C.J. Reports 1952*, at p. 109. See also draft articles 8 and 9 of the Commission's draft articles on most-favoured-nation clauses (*Yearbook ... 1978*, vol. II (Part Two), pp. 16–73.

[672] UNCTAD, *Most-Favoured-Nation Treatment*, Series on Issues in International Investment Agreements II (United Nations Publication, UNCTAD/DIAE/IA/2010/1, Sales No. E.10.II.D.19, New York and Geneva: 2010), pp. 84–87.

[673] *Impregilo S.p.A. v. Argentine Republic* (Argentine Republic-Italy BIT), ICSID Case No. ARB/07/17, 17 June 2011. See: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C109.

[674] Dissenting opinion by Professor Brigitte Stern, Arbitrator, paras. 16 and 45.

factors appeared to influence different tribunals. In such circumstances, the task of drawing any general conclusions about interpretative approaches across the investment decisions was not an easy exercise. The challenge for the Study Group was in part to make an assessment that would potentially flesh out some underlying theoretical framework to explicate the reasoning in the decisions.

359. In this connection, it was also noted that the concurring and dissenting opinion *Impregilo S.p.A.* provided a possible framework for extrapolating ways in which the *ejusdem generis* question ought to be approached, namely by first addressing whether the fundamental preconditions for invocation of access — conditions *ratione personae*, *ratione materiae*, *ratione temporis* of access to the rights granted in the BIT — have been satisfied. In this regard, it was recalled that article 14 of the 1978 draft articles on the MFN Clause provided that the exercise of rights arising under a MFN clause for the beneficiary State or for persons or things in a determined relationship with that State was subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State. In other words, instead of a two-step process deciding, explicitly or implicitly, whether in principle MFN clauses covered dispute settlement provisions, and embarking on the interpretation of the MFN provision in question to see whether it applied in fact to dispute settlement provisions, there was a prior step, possibly overlooked in the case-law, aimed at determining who was entitled to benefit and whether the preconditions for access had been fulfilled.

360. The Study Group viewed it advisable to review the various approaches taken, drawing attention to the strengths and weaknesses of each approach. It was noted that the *treaty interpretation approach* may be a misnomer since the whole process was about treaty interpretation. It was confirmed that the general point of departure would be the Vienna Convention of the Law of Treaties, supplemented by any principles that may be deduced from practice in the investment area, although it was noted that reference to the separate treaty-making practice of each of the parties to the BIT, in respect of which an MFN claim had been made, as a means to ascertain the intention of the parties regarding the scope of the MFN clause, did not seem to find support in the VCLT.

2. Future work

361. The Study Group once more affirmed the need to study further the question of MFN in relation to trade in services and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. A further look should also be taken at other areas of international law to see if any application of MFN there might provide some insight for the Study Group's work.

362. The Study Group anticipates that its work could be completed within two more sessions of the Commission. It was underscored that the work of the Study Group should seek to safeguard against fragmentation of international law by assuring the importance of greater coherence in the approaches taken in the arbitral decisions. It was considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. It was stressed that the effort should strive at preparing an outcome that would be of practical utility to those involved in the investment field and to policymakers. The Study Group affirmed its intention not to prepare any draft articles or to revise of the 1978 draft articles. Instead, further work will be undertaken under the overall guidance of the Co-Chairmen of the Study Group to put together a draft report providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including model clauses.

Chapter XIII
Other decisions and conclusions of the Commission

A. Programme, procedures and working methods of the Commission and its documentation

363. At its 3089th meeting, on 17 May 2011, the Commission established a Planning Group for the current session.[675]

364. The Planning Group held two meetings. It had before it Section J of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session, entitled "Other decisions and conclusions of the Commission"; the proposed Strategic Framework for the period 2012–2013 (A/65/6), covering "Programme 6: Legal Affairs"; General Assembly resolution 65/26 of 6 December 2010 on the Report of the International Law Commission on the work of its sixty-second session, in particular paragraphs 7, 8, and 13 to 21; General Assembly resolution 65/32 of 6 December 2010 on the rule of law at the national and international levels, as well as chapter XIII, section A.2, of the report of the Commission on the work of its sixty-second session concerning the consideration of General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels.

1. Working Group on the Long-term Programme of Work

365. At its 1st meeting, on 4 May 2011, the Planning Group decided to reconstitute the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Enrique Candioti. The Chairman of the Working Group submitted an oral report to the Planning Group on 3 August 2011, of which the Planning Group took note. The Planning Group recommended and the Commission endorsed the inclusion of the following topics in the long-term programme of work of the Commission:

(a) Formation and evidence of customary international law;

(b) Protection of the atmosphere;

(c) Provisional application of treaties;

(d) The fair and equitable treatment standard in international investment law;

(e) Protection of the environment in relation to armed conflicts.

366. During the quinquennium, the Working Group on Long-term Programme of Work considered a number of topics and requested members of the Working Group to prepare drafts on these topics. The Group was guided by the recommendation of the Commission at its fiftieth session (1998) regarding the criteria for the selection of the topics:

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[675] The Planning Group was composed of Ms. M.G. Jacobsson (Chairperson); Members: Mr. L. Caflisch, Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. C.J.R. Dugard, Ms. C. Escobar Hernández, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. F. Kemicha, Mr. R.A. Kolodkin, Mr. T.V. Melescanu, Mr. D.M. McRae, Mr. S. Murase, Mr. B. Niehaus, Mr. G. Nolte, Mr. A. Pellet, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. A.R. Perera (*ex officio*).

(a) The topic should reflect the needs of States in respect of the progressive development and codification of international law;

(b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;

(c) The topic is concrete and feasible for progressive development and codification;

[and]

> ... the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[676]

367. The syllabuses of the topics included by the Commission in its long-term programme of work at the present session are annexed to the present report. It was felt that all those topics constitute useful contributions to the codification and progressive development of international law. Moreover, some of them venture into fields which the Commission had not sufficiently considered so far (environment, humanitarian law).

368. It should also be recalled that the Commission, in the course of the present quinquennium, decided to inscribe in its programme of work the following topics recommended by the Working Group:

(a) Treaties over time;

(b) The Most-Favoured-Nation clause.

369. Finally, there are four more topics that remain inscribed in the long-term programme of work from previous quinquennia:

(a) Jurisdictional immunity of international organizations;

(b) Protection of personal data in trans-border flow of information;

(c) Extraterritorial jurisdiction;

(d) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction.

2. Methods of work of the Commission

370. At its first meeting on 27 May 2011, the Planning Group decided to establish a Working Group on Methods of Work.[677] The Working Group, chaired by Mr. Hussein A. Hassouna, held four meetings on 30 and 31 May, and on 20 and 25 July 2011. Its report was adopted by the Planning Group.

371. The Working Group took into consideration paragraphs 8 and 9 of General Assembly resolution 65/26 of 6 December 2010. It also had as a point of reference the 1996

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[676] Report of the Commission on the work of its fiftieth session (1998) (A/53/10), *Yearbook ... 1998*, vol. II (Part Two), p. 10, para. 553.

[677] The Working Group on Methods of Work was composed of Mr. Hussein A. Hassouna (Chairman); Members: Mr. L. Caflisch, Mr. E. Candioti, Mr. S. Fomba, Mr. Z. Galicki, Ms. M.G. Jacobsson, Mr. T.V. Melescanu, Mr. S. Murase, Mr. E. Petrič, Mr. G. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. A.R. Perera (*ex officio*).

report of the Group on Working Methods of the Commission[678] and the Commission's decisions in that effect. The Working Group recommended the following conclusions to improve the working methods of the Commission that the Commission adopted at its 3127th meeting on 12 August 2011:

(a) Role of the Special Rapporteurs

372. In view of the key role that the Special Rapporteurs have in the work of the Commission, they are expected:

(i) to prepare each year a substantive report on their respective topic;

(ii) to make every effort to limit the length of each report to no more than 50 pages;

(iii) to submit their full report to the Secretariat at least six weeks before the start of each session;

(iv) to be available to attend a substantial part of each session so that special adjustments do not have to be made to the programme of work of the Commission;

(v) to be ready to summarize the debate the day following the completion of the debate or as soon as possible thereafter; and

(vi) to prepare concise draft commentaries that will be designed to explain the texts adopted at each session on their topic.

(b) Study Groups

373. A Study Group should aim at achieving a concrete outcome in accordance with the mandate of the Commission and within a reasonable time. The possibility of replacing a Study Group by appointing a Special Rapporteur as the topic progresses should be considered, as appropriate.

(c) Drafting Committee

374. Given the hard work that the Chairman of the Drafting Committee has to face during the whole session, in practice chairmen have sometimes had recourse to an experienced colleague in order to delegate the work when they need to be absent. This informal arrangement seems to work well and there is no need to formalize it further.

375. The Drafting Committee has progressively become a body entrusted also with substantive issues of negotiation. It is difficult to separate drafting from substance, but, as soon as a hardcore issue proves difficult to be overcome in the Drafting Committee, it may be transferred to a more informal setting such as a working group, a practice which has been resorted to in the past.

376. Regarding the form of presentation of the report of the Drafting Committee to the Plenary, it would be possible to recommend to the drafters of the statement to try to make it shorter without making the substance suffer. However, the length of the statement is also determined by the quantity and complexity of the draft articles presented. The Commission welcomes the placement on the website of the statement of the Chairman and suggests that it could be complemented by the placement of an annex of the draft articles adopted by the Plenary.

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[678] *Yearbook ... 1996*, vol. II (Part Two), pp. 84–97.

377. Paragraphs 212 to 216 of the Commission's 1996 report[679] are still relevant and could be considered.

(d) Planning Group

378. The work of the Planning Group could be adjusted as follows:

(i) The Planning Group should closely monitor and advise the Commission on the optimum organization of forthcoming sessions, taking into account the topics included in the agenda. This requires that the Planning Group be allocated appropriate time at an early stage of the session.

(ii) Priorities for completion of topics could be proposed by the Group to the Plenary, bearing in mind recommendations, if any, from the General Assembly.

(iii) The Group should cooperate with Special Rapporteurs and coordinators of Study Groups to define, at the beginning of any new topic, a tentative schedule for the development of the topic over a number of years as may be required, and periodically review the attainment of annual targets in such schedule, updating it when appropriate.

(iv) The Group should, in particular, at the end of each annual session, discuss a preliminary plan for the next annual session and its duration, and advise the Commission accordingly.

(e) Preparation of commentaries to draft articles[680]

379. The Commission should reconsider the present practice of leaving the formulation of commentaries to draft articles to the respective Special Rapporteurs alone and discussing those commentaries only at the time of adoption of the Commission's annual report, under pressure to finish the latter and without sufficient time for members to study the commentaries carefully.

380. Special Rapporteurs should be asked to submit draft commentaries as soon as possible after the adoption of the draft articles they propose. Time permitting, the draft commentaries should then be dealt with and provisionally approved in the Drafting Committee.

381. The Drafting Committee does not currently examine the content of the commentaries, which are directly presented to the Plenary. Elements of commentaries could, where appropriate and possible, be considered by the Drafting Committee before being incorporated into the final commentaries. This was experienced in the past (see paragraphs 196 to 199 of the Commission's 1996 report[681]).

382. Commentaries should, in general, be as concise as possible, consistent with providing adequate explanations of the draft articles.

(f) Final form

383. A preliminary indication as to the final form of the work undertaken on a specific topic (draft articles which might be embodied in a convention, declaration of principles,

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[679] *Ibid.*, pp. 93–94.

[680] See the recommendations contained at paras. 196 to 199 in Chapter VII of the Commission's 1996 report; *ibid.*, p. 92

[681] *Ibid.*

guidelines, expository study with conclusions and recommendations, etc.) should, as far as possible, be made at an early stage by Special Rapporteurs or Study Groups, subject to review and later adjustment as the work develops.

(g) The Commission's report

384. The Commission should make Chapter II of the report (Summary) more informative, covering succinctly the main issues on which there had been important debates and a description of the achievements of the session.

385. The Commission should take particular care to make Chapter III of the report ("Specific issues on which comments would be of particular interest to the Commission") as clear and specific as possible.

(h) Relationship with the Sixth Committee

(1) Chairman's introduction of the Commission's report in the Sixth Committee

386. The introduction of the Commission's report in the Sixth Committee by the Chairman of the Commission should continue to be divided into parts. Each part should be as concise as possible (in general, not longer than 30 minutes).

(a) The introduction should concentrate on the main points, and not go into details of drafting etc.;

(b) These main points should include:

(i) proposals for new topics (if any);

(ii) issues on which the Commission particularly wishes to hear from Member States;

(iii) main achievements of the Commission during the last year (e.g. completion of first or second readings); and

(c) If the Special Rapporteur is present when 'his' or 'her' chapter of the report is introduced, the Special Rapporteur should be invited to add his comments after the introduction by the Chairman of the Commission.

(2) Dialogue with the Sixth Committee

387. The Special Rapporteurs (and indeed any member of the Commission present in the Sixth Committee) should be ready to take part in the inter-active segment of the Sixth Committee's "international law week". Members of the Commission are also encouraged to be in touch with the organizers of the interactive segment and of the Legal Advisers meeting to discuss the arrangements for those meetings.

388. Consideration should be given to the possibility of having one half session each quinquennium in New York so as to facilitate direct contact between the Commission and delegates of the Sixth Committee.

3. Length and nature of future sessions

389. The Commission stressed the importance of retaining split sessions for the efficiency and effectiveness of its work and recalled its decision of 1999 on this matter.[682] It also reaffirmed its decision of 2000 concerning the length, nature and place of future sessions of the Commission, reiterating its views expressed in paragraph 227 of its 1996 report[683] that "… in the longer term, the length of sessions is related to the question of [its work] organization" and that "if a split session is adopted … its work can usually be effectively done in a period of less than 12 weeks a year. It sees good reason for reverting to the older practice of a total annual provision of 10 weeks, with the possibility of extension to 12 weeks in particular years, as required". Consequently, and unless significant reasons related to the organization of its work otherwise require, the length of the sessions during the initial years of the Commission's future mandate should be of 10 weeks and, during its final years, of 12 weeks.

390. In this regard, the Commission emphasized its view that only a split session allows sufficient time for the preparation of the commentaries on the texts adopted during the first part of the session. This is necessary for the Commission to fulfil its mandate effectively.

391. In addition, given that several members of the Commission might not be able to attend the entire ten- or twelve-week duration of an undivided session, the efficacy of the Commission would be hampered if the undivided session were to be reintroduced.

4. Consideration of General Assembly resolution 65/32 of 6 December 2010 on the rule of law at the national and international levels

392. The General Assembly, in resolution 65/32 of 6 December 2010 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission has commented annually on its role in promoting the rule of law since 2008. The Commission notes that the substance of the comprehensive comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remains relevant and reiterates the comments in paragraph 231 of its 2009 report (A/64/10) as well as the comments in paragraphs 390 to 393 of its 2010 report (A/65/10).[684]

393. The Commission recalls that the rule of law constitutes the essence of the Commission, for its basic mission is to guide the development and formulation of the law. The Commission notes that the role of the General Assembly in encouraging the progressive development of international law and its codification is reaffirmed in General Assembly resolution 65/32 on the rule of law at the national and international levels. As an organ established by the General Assembly and in keeping with the mandate set out in Article 13 (1) (a) of the Charter of the United Nations, the Commission continues to promote the progressive development and codification of international law.[685]

394. The Legal Counsel of the United Nations recognized the existence of two interdependent dimensions to the concept of the rule of law. Whilst one dimension is national and the other dimension is international, their interdependence was explicitly acknowledged in the Millennium Declaration, whereby the Heads of State and Government

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[682] See *Yearbook … 1999*, vol. II (Part Two), paras. 633–639.

[683] See *Yearbook … 2000*, vol. II (Part Two), paras. 734–735.

[684] See also *Official records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/65/10), para. 389.

[685] *Ibid.*, para. 390.

affirmed their resolve to "strengthen respect for the rule of law in international as in national affairs."[686]

395. Judge Hisashi Owada, President of the International Court of Justice, has convincingly emphasized both substantive legal content as well as the more traditional procedural focus of the rule of law. According to President Owada, "the rule of law, when applied at the international level, requires a reconceptualization of the principle that incorporates both its process and its substance, taking account of the systemic differences between the domestic and international legal order".[687] He concludes that "*the rule of law at the international level increasingly permeates the rule of law at the national level…*"[688]

396. Bearing in mind the close interrelation of the rule of law at the international level and that at the national level, the Commission, in fulfilling its mandate of codification and progressive development, considers that its work should be informed where appropriate by the principles of human rights that are fundamental to the international rule of law as reflected in the preamble and in Article 13 of the Charter of the United Nations. Accordingly, the Commission has brought awareness of the rule of law at the international level through its work on topics like Protection of persons in the event of disasters; Expulsion of aliens; Obligation to extradite or prosecute (*aut dedere aut judicare*); Immunity of State officials from foreign criminal jurisdiction; and Effects of armed conflict on treaties.

397. The General Assembly could recall in this context the Commission's contribution to the rule of law.

398. The Commission reiterates its commitment to the rule of law in all of its activities.[689]

5. Honoraria

399. The Commission reiterates once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in the previous reports of the Commission.[690] The Commission emphasizes that the above resolution especially affects Special Rapporteurs, as it compromises support for their research work.

6. Assistance to Special Rapporteurs

400. The Commission wishes to reaffirm that its Special Rapporteurs have a special role to play in its working methods. The independent character of the Commission accords to its Special Rapporteurs a responsibility to work cooperatively with the Secretariat but also

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[686] http://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2010.pdf.

The Legal Counsel's address begins at page 51.

[687] Background – ICJ President Hisashi Owada, in his article "The Rule of Law in a Globalizing World – An Asian Perspective" (*Washington University Global Studies Law Review*, v. 8(2) 2009, p. 193; http://law.wustl.edu/WUGSLR/Issues/Volume8_2/owada.pdf.

[688] *Ibid.*, p. 203.

[689] *Official records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/65/10), para. 393.

[690] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525–531; *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 358; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 240; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396.

independently of it. While recognizing the invaluable assistance of the Codification Division, the Commission notes that the exigencies and the very nature of the work of Special Rapporteurs as independent experts, which continues year round, imply that some forms of assistance that they need go beyond that which could be provided the Secretariat. In particular, the writing of the report by the Special Rapporteurs requires various forms of immediate research work associated therewith, the provision of which by the Secretariat located in Headquarters is entirely impracticable. Such work, which constitutes an essential element of the Commission's deliberations, has to be accomplished within the parameters of already existing responsibilities of the Special Rapporteurs in various professional fields, thereby adding an extra burden that may not be easily quantifiable in monetary terms and affecting the conditions of their work. The Commission expresses the hope that the General Assembly will view it appropriate to consider this matter anew in light of the real impact that it has on the proper functioning of the Commission as a whole.

7. Attendance of the General Assembly by Special Rapporteurs during the consideration of the Commission's report

401. The Commission notes that, with a view to strengthening its relationship with the General Assembly, it has, on previous occasions, drawn attention to the possibility of enabling Special Rapporteurs to attend the Sixth Committee's debate on the report of the Commission.[691] The Commission wishes to reiterate the usefulness of Special Rapporteurs being afforded the opportunity to interact with representatives of Governments during the consideration of their topics in the Sixth Committee.

8. Documentation and publications

(a) Processing and issuance of reports of Special Rapporteurs

402. The Commission reiterates the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function in the progressive development of international law and its codification. The Commission also wishes to stress that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it strongly believes that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the Commission's work.[692] The Commission stressed also the importance of the timely preparation of reports by Special Rapporteurs for submission to the Commission and delivery to the Secretariat.

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[691] *Yearbook ... 1988*, vol. II (Part Two), para. 582; *ibid., ... 1989*, vol. II (Part Two), para. 742; and *Official records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/65/10), para. 398.

[692] For considerations relating to page limits on the reports of Special Rapporteurs, see for example, *Yearbook ... 1977*, vol. II (Part Two), p. 132, and *Yearbook ... 1982*, vol. II (Part Two), pp. 123–124. See also General Assembly resolution 32/151, para. 10, and General Assembly resolution 37/111, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

(b) Summary records of the work of the Commission and posting them on the website

403. The Commission has on several occasions confirmed that the summary records are "an inescapable requirement for the procedures and methods of its work. They constitute the equivalent of *travaux préparatoires* and are an indispensable part of the process of progressive development of international law and its codification. They are vital for the Commission's work".[693] Moreover, the Commission continues to stress the importance of summary records as an essential part of its *Yearbook*. The production of the summary records in all the United Nations official languages makes the work of the Commission known to the general public and to States, thus assuring also transparency about the Commission's activity. They also satisfy the needs of members of the Commission and, in particular, Special Rapporteurs to take into account what was done in the past at various stages of the Commission's work, as useful background for further study and preparation of new documents. Finally, they constitute important reference material for governments, practitioners and international and domestic courts and tribunals, as well as academics and research students.

404. The Commission welcomes the efforts of the Secretariat to include the Commission's provisional summary records on the website. It took note of the Secretariat's decision to do so on a trial basis and on the understanding that they would be posted on the site as soon as the electronic versions are received by the Secretariat of the Commission where possible, or shortly thereafter, and subject to the availability of resources to do so.

405. The Commission indicated that the inclusion of the provisional summary records on the website concerning the Commission is not intended as a replacement for the established procedures for the production of the *Yearbook of the International Law Commission*, as mandated by the General Assembly, but rather as a way of mitigating the impact of the delay in the preparation and publication of the final corrected version of the summary records.

(c) *Yearbook of the International Law Commission*

406. In its resolution 176 (II) of 21 November 1947, the General Assembly stated that "one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations". In resolution 987 (X) of 3 December 1955, the Assembly requested the Secretary-General to arrange for the printing each year of the documents and records of the Commission. At its eighth session, in 1956, the Commission recommended that such records and documents be published in the form of a Yearbook.[694]

407. Since its inception, the *Yearbook of the International Law Commission* has become an authoritative international legal publication critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The *Yearbook* has been extensively cited in legal proceedings before international courts and tribunals, and by Governments in their official communications. It has further proved an invaluable resource for practitioners and academics alike seeking evidence of customary

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[693] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 367.

[694] *Yearbook... 1956*, vol. II, para. 42. The *Yearbook of the International Law Commission* has been published annually, and currently covers the product of the Commission for the period from 1949 until approximately 2004.

international law. The *Yearbook* constitutes an indispensable tool for the preservation of the legislative history of the documents emanating from the Commission, as well as for the teaching, study, dissemination and wider appreciation of the efforts undertaken by the Commission in the progressive development of international law and its codification.

408. Volume I of the *Yearbook* consists of the final edited version of the summary records of the Commission's meetings. In its volume II, the *Yearbook* presents, in a systematic way, the final edited version of the various documents pertaining to the work of the Commission. Such documents include, in particular, the annual reports of the Commission, the reports presented by the Special Rapporteurs on the various topics on the Commission's programme of work, as well as studies or memoranda prepared by the Secretariat of the Commission on given topics.

409. It should be noted that these various documents undergo an elaborate process of referencing and editing before their inclusion in the *Yearbook*. This is particularly true with respect to the citations which, for various reasons, are far from being complete and finalized in the parliamentary form of such documents. Thus, the Commission emphasizes the scientific value of the *Yearbook* and its long-term interest for governments, practitioners and academics, courts and tribunals, as the publication that crystallizes the work of the Commission in the most accurate and final form. While noting the considerable progress made in the reduction of the backlog, the Commission expressed the wish to further reduce and finally eliminate the backlog in the publication of the *Yearbook*.

(d) Trust fund on the backlog relating to the *Yearbook of the International Law Commission*

410. The Commission reiterated that the *Yearbooks* were critical to the understanding of its work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission noted with appreciation that the General Assembly, in its resolution 65/26, acknowledged the establishment by the Secretary-General of a trust fund to accept voluntary contributions so as to address the backlog relating to the *Yearbook* of the International Law Commission and invited voluntary contributions to that end.

(e) Assistance of the Codification Division

411. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the work of the Commission. The Commission reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work, and reiterated its request that the Codification Division continue to provide the Commission with these publications.

(f) Websites

412. The Commission once again expressed its appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[695] The Commission reiterated that this website and other websites maintained by the Codification Division[696] constitute an invaluable resource for the Commission in undertaking its work and for researchers of work of the Commission in

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[695] Located at http://www.un.org/law/ilc/.

[696] Generally accessible through: http://www.un.org/law/lindex.htm.

the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission notes that the website on the work of the Commission includes information on the current status of the topics on the agenda of the Commission, as well as advance edited versions of summary records of the Commission.

B. Date and place of the sixty-fourth session of the Commission

413. The Commission decided that its sixty-fourth session be held in Geneva from 7 May to 1 June and 2 July to 3 August 2012.

414. The Commission emphasizes the exceptional character of the proposed duration of the sixty-fourth session of the Commission (nine weeks) due to the fact that three important topics on the Commission's agenda have just been completed. The Commission takes also into consideration the current financial constraints of the United Nations while bearing in mind paragraph 9 of General Assembly resolution 65/26 and its invitation to the International Law Commission to continue to take cost-saving measures without prejudice to the efficiency and effectiveness of its work.

415. The Commission stresses the fact that the split session for 2012 is an essential condition for the good planning and efficiency of a nine-week session.

C. Peaceful settlement of disputes

416. Pursuant to a decision taken at its sixty-second session (2010),[697] the Commission, at its 3095th and 3096th meetings on 31 May and 1 June 2011, held a discussion on "Peaceful settlement of disputes", under agenda item "Other matters", on the basis of a working paper (A/CN.4/641) by Mr. Michael Wood. For that purpose, the Commission also had before it a note by the Secretariat on "Settlement of disputes clauses" (A/CN.4/623), presented to the Commission at its sixty-second session.

417. The working paper presented by Mr. Wood included, in Section II, a summary of the debate within the Commission in 2010 and a list of specific suggestions made on that occasion. Section III recalled work already done on peaceful settlement of disputes by the United Nations and other bodies, including regional organizations, while Section IV contained tentative suggestions for possible topics relating to the peaceful settlement of disputes,[698] which could be further developed or complemented within the Working Group on the Long-Term Programme of Work, in particular a possible study on ways and means of improving procedures for dispute settlement involving international organizations. In discussing these suggestions, the Commission expressed its support for addressing the issue of procedures for dispute settlement involving international organizations within the Working Group on Long-term Programme of Work.

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[697] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 388.

[698] For a list of possible topics, see para. 20 of the working paper (A/CN.4/641).

D. Cooperation with other bodies

418. At its 3100th meeting, on 7 July 2011, Judge Hisashi Owada, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it,[699] drawing special attention to aspects that have a particular relevance to the work of the Commission. An exchange of views followed.

419. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe were represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public international Law (CAHDI), Ms. Edwige Belliard, and the Director of Legal Advice and Public International Law of the Council of Europe, Mr. Manuel Lezertua, who addressed the Commission at its 3101st meeting, on 8 July 2011.[700] They focused on the current activities of CAHDI on a variety of legal matters, as well of the Council of Europe. An exchange of views followed.

420. The Inter-American Juridical Committee was represented at the present session of the Commission by Ms. Hyacinth Lindsay, who addressed the Commission at its 3108th meeting, on 20 July 2011.[701] She gave an overview of the activities of the Committee as contained in its annual report. An exchange of views followed.

421. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Mr. Rahmat Bin Mohamad, addressed the Commission at its 3112th meeting, on 26 July 2011.[702] He briefed the Commission on the recent and forthcoming activities of AALCO. In particular, he reviewed the consideration given by AALCO to the work of the Commission. An exchange of views followed.

422. On 20 July 2011, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest, including an overview of the main priorities of the ICRC Legal Division and a presentation on the ICRC project on strengthening legal protection for victims of armed conflicts, as well as issues concerning the topic "Treaties over time".[703] An exchange of views followed.

E. Representation at the sixty-sixth session of the General Assembly

423. The Commission decided that it should be represented at the sixty-sixth session of the General Assembly by its Chairman, Mr. Maurice Kamto.

424. The Commission regrets that, due to financial constraints, it could not request one or more Special Rapporteurs to attend the sixty-sixth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.

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[699] This statement is recorded in the summary record of that meeting.

[700] *Ibid.*

[701] *Ibid.*

[702] *Ibid.*

[703] Mr. Knut Dörmann, Legal Adviser of the ICRC, gave an overview of the main priorities of the ICRC Legal Division and Mr. Slyvain Vité gave a presentation on the ICRC project on strengthening legal protection for victims of armed conflicts. Mr. G. Nolte, the Chairman of the Study Group on "Treaties over time", gave an overview on the topic.

F. Gilberto Amado Memorial Lecture

425. On 19 July 2011, members of the Commission, participants of the International Law Seminar and other experts of international law attended the Gilberto Amado Memorial Lecture, entitled "*La portée du consentement comme fondement de l'autorité de la sentence de la Cour internationale de Justice*", which was delivered by Professor Leonardo Nemer Caldeira Brant. Also in attendance was the Permanent Representative of Brazil to the United Nations in Geneva.

G. Memorial seminar in honour of Professor Paula Escarameia

426. A memorial seminar was organized in honour of Professor Paula Escarameia by Ms. Marie G. Jacobsson and the Graduate Institute of International and Development Studies of Geneva (HEID). The seminar, entitled "*International Law as a Tool for Humanity*", was held at the HEID on 12 July 2011. It was followed by a reception offered by the HEID.

H. International Law Seminar

427. Pursuant to General Assembly resolution 65/26, the forty-seventh session of the International Law Seminar was held at the Palais des Nations from 4 to 22 July 2011, during the present session of the Commission. The Seminar is intended for young academics and diplomats specializing in international law.

428. Twenty-six participants of different nationalities took part in the session.[704] The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

429. The Seminar was opened by Mr. Maurice Kamto, Chairman of the Commission. Mr. Markus Schmidt, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar. The scientific coordination of the Seminar was ensured by the University of Geneva. Mr. Vittorio Mainetti, from the University of Geneva, acted as coordinator, assisted by Mr. Martin Denis, Legal assistant.

430. The following lectures were given by members of the Commission: Mr. Stephen C. Vasciannie: "*The Work of the International Law Commission*"; Mr. Georg Nolte: "*Treaties*

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[704] The following persons participated in the forty-seventh session of the International Law Seminar: Mr. Kavus Abushov (Azerbaijan), Mr. Muhammad Zeeshan Adhi (Pakistan), Mr. Yawo Akagla Edem Akpemado (Togo), Mr. Ryuji Baba (Japan), Ms. Leticia M.L. Baquerizo Guzman (Ecuador), Mr. Gonzalo Bonifaz (Peru), Mr. Shehzad Charania (United Kingdom), Mr. Aminudin Zaki Dato Abdul Rahman (Brunei), Ms. Tanieris Dieguez La O (Cuba), Mr. Martin Faix (Slovakia), Ms. Martyna M. Falkowska (Poland), Mr. Ruddy J. Flores Monterrey (Bolivia), Ms. Fabiola Jiménez Morán Sotomayor (Mexico), Mr. Sidney G. Kemble (Netherlands), Ms. Belinda M. Kiilu (Kenya), Mr. Duwayne C. Lawrence (Jamaica), Mr. Charles R. Majinge (Tanzania), Mr. Mohamed H. Mohamed Abubacker (Sri Lanka), Ms. Tshenolo B. Moyo (Botswana), Mr. Ragnar Nordeide (Norway), Mr. Gregor Novak (Austria/Croatia), Mr. Clauvis O. Ogoubiyi (Benin), Ms. Rashmi Raman (India), Mr. Javier I. Santander (Argentina), Mr. Romain B. Tchamako (Central African Republic), Ms. Annelle Urriola (Panama). The Selection Committee, chaired by Ms. Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva, met on 29 April 2011 at the Palais des Nations and selected 28 candidates out of 134 applications for participation in the Seminar. Of the 28, two selected candidates failed to attend.

over Time"; Mr. Alain Pellet: "*20 years at the International Law Commission*"; Mr. Michael Wood: "*Responsibility of International Organizations*"; Mr. A. Rohan Perera: "*A Comprehensive Convention against Terrorism: Current Status of Negotiations*", and Mr. Lucius Caflisch: "*The Effects of Armed Conflicts on Treaties*".

431. Lectures were also given by Mr. Daniel Müller, Assistant to the Special Rapporteur Mr. Alain Pellet: "*Reservations to Treaties*"; Mr. Eric Tistounet, Chief of the Human Rights Council Branch of the Office of the High Commissioner for Human Rights: "*The Human Rights Council After Five Years: A Preliminary Stocktaking*"; Mr. Markus Schmidt: "*Interdependence of International, Regional and National Human Rights Jurisprudence: Some Reflections*".

432. Three special external sessions were organized in the premises of the University of Geneva and of the Graduate Institute of International and Development Studies of Geneva (HEID). At the University of Geneva, seminar participants attended the international conference: "*Freshwater and International Law: The Multiple Challenges*", organized by Professor Laurence Boisson de Chazourne, Director of the Platform for International Water Law, University of Geneva, and Mr. Stephen McCaffrey, Former Special Rapporteur on the Law of the non-navigational uses of International Watercourses, International Law Commission. The University of Geneva also organized a special session with lectures given by Mr. Salman Salman, former Legal Adviser of the World Bank: "*The New State of South-Sudan and Challenges of Secession*", Mr. Makane Moïse Mbengue, Lecturer, School of Law, University of Geneva: "*ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*", and Ms. Mara Tignino, Senior Researcher, University of Geneva: "*Public Participation in Management of Transboundary Water Resources*". The session was followed by a reception offered by the International Relations Office of the University of Geneva. At the HEID, seminar participants attended lectures given by Professor Marcelo Kohen: "*Is the Creation of States a Pure Matter of Fact?*"; Professor Vera Gowlland-Debbas: "*The Status of Palestine in International Law*", Mr. Eric Wyler: "*Recognition of States and States Creation in Light of Recent Practice*" and Professor Lucius Caflisch, "*The Law of International Watercourses: Problems and Perspectives*".

433. Seminar Participants also took part in the Memorial seminar organized in honour of Professor Paula Escarameia (see sect. G above), and were invited to attend the Gilberto Amado Memorial Lecture (see sect. G above).

434. Two Seminar working groups on "*The Future Role of the International Law Commission*" and the "*Protection of Persons in the Event of Disasters*" were organised. Each Seminar participant was assigned to one of them. Two members of the Commission, Mr. Stephen C. Vasciannie and Mr. Eduardo Valencia Ospina, provided expert guidance to the working groups. Each group prepared a report and presented its findings to the Seminar in a special session. The reports were compiled and distributed to all participants, as well as to the members of the Commission.

435. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama Room at the City Hall.

436. Mr. Bernd H. Niehaus, Second Vice-Chairman of the International Law Commission, Mr. Markus Schmidt, Director of the Seminar, and Ms. Martyna M. Falkowska (Poland) on behalf of the participants of the seminar, addressed the Commission and the participants at the closing ceremony of the Seminar. Each participant was presented with a certificate of participation.

437. The Commission noted with particular appreciation that during the last three years the Governments of Austria, China, Croatia, the Czech Republic, Finland, Hungary, India, Ireland, Lebanon, Mexico, Sweden and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of

the Fund allowed for the award of several fellowships to deserving candidates, especially from developing countries, in order to achieve adequate geographical distribution of participants. This year, fellowships (travel and/or subsistence allowance) were awarded to 16 candidates. The Commission notes that the finances of the Seminar have been strained in 2010 and 2011, and encourages Governments to make voluntary contributions to allow the Seminar to continue in its present form.

438. Since 1965, year of the Seminar inception, 1086 participants, representing 163 nationalities, have taken part in the Seminar. Of them, 650 have received fellowships.

439. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries and from all geographic regions and legal traditions, to familiarize themselves with the work of the Commission and the activities of the many International Organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2012 with as broad participation as possible.

440. The Commission noted with satisfaction that, in 2011, interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided at the next session, within existing resources.

Annexes

Annex A.	Formation and evidence of customary international law
Annex B.	Protection of the atmosphere
Annex C.	Provisional application of treaties
Annex D.	The fair and equitable treatment standard in international investment law
Annex E.	Protection of the environment in relation to armed conflicts

Annex A
Formation and evidence of customary international law
(Mr. Michael Wood)

1. Questions relating to sources lie at the heart of international law. The Commission's work in this field has been among its most important and successful, but has been largely confined to the law of treaties. It is proposed that a topic entitled "Formation and Evidence of Customary International Law" be included in the Commission's Long-term Programme of Work. The proposed title would not preclude the Commission from entering upon related aspects if this proved desirable, but the focus would be on formation (the process by which rules of customary international law develop) and evidence (the identification of such rules). As is always the case, it will be important, if and when the Commission takes up the topic, to define carefully from the outset the scope of the topic and to prioritize issues.

2. Notwithstanding the great increase in the number and scope of treaties, customary international law remains an important source of international law. The ideal of a fully codified law, rendering customary international law superfluous, even if it were desirable, is far from becoming a reality. In the past, much was written on the subject of customary international law. In recent years there has been a tendency in some quarters to downplay its significance. At the same time, ideological objections to the role of customary international law have diminished. There now appears to be a revival of interest in the formation of customary international law, in part stimulated by the attempts, sometimes quite controversial, of domestic courts to grapple with the issue. The formation of customary international law now has to be seen in the context of a world of nearly 200 States, and numerous and varied international organizations, both regional and universal.

3. There are differing approaches to the formation and identification of customary international law. Yet an appreciation of the process of its formation and identification is essential for all those who have to apply the rules of international law. Securing a common understanding of the process could be of considerable practical importance. This is so not least because questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations.

4. The aim is not to seek to codify "rules" for the formation of customary international law. Instead, the aim is to produce authoritative guidance for those called upon to identify customary international law, including national and international judges. It will be important not to be overly prescriptive. Flexibility remains an essential feature of the formation of customary international law. In view of this, the Commission's final output in this field could take one of a number of forms. One possibility would be a series of propositions, with commentaries.

5. International courts have done something to clarify the issues, as have domestic courts. And there is a vast amount of writing on the subject. But previous collective efforts to describe, systematically, the process of formation of customary international law, while containing much useful material, have not met with general approval.[1] And there remain

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[1] The *London Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted on 29 July 2000 by the International Law Association: see *International Law Association, Report of the Sixty-ninth Conference, London*, p. 39. For the plenary debate, see *ibid.*, pp. 922–926.

considerable differences of approach amongst writers. Against this background, the International Law Commission, given its composition and collegiate working methods, and its close relationship through the General Assembly with States, may be able to make a useful contribution.

General scheme

6. It is suggested that, for convenience, the topic be considered in a number of stages (though the division between them would not be rigid): underlying issues and collection of materials; some central questions concerning the identification of State practice and *opinio juris*; particular topics; and conclusions. The following paragraphs are intended to be illustrative; not all matters listed will necessarily be taken up, and others may be.

(i) Underlying issues and materials

7. The first stage would cover some underlying issues, as well as reviewing the basic materials. It could include consideration of the following matters:

(i) Description of the scope of the topic, and options for possible outputs. It is essential to ensure that the scope is clearly delimited. It will be necessary to delimit the topic *vis-à-vis* topics already considered or being considered, such as "Fragmentation" and "Treaties over time", or topics which may be considered in the future, such as *jus cogens*. Which issues are actually covered would be a matter for the Commission in due course.

(ii) Terminology/definitions. The use and meaning of the term "customary international law" or "rules of customary international law", which seem to be the expressions in most common use (others are "international customary law", "custom", "international custom"). *Lex lata*, *lex ferenda*, and "soft law". The establishment of a short lexicon of relevant terms, in all United Nations official languages, could be useful.

(iii) The place of customary international law within the international legal system (*Lotus* principle; "*toile de fond*"[2]), including the relationship of "customary international law" to "general international law", to "general principles of law", and to "general principles of international law". This may require an examination of the use and meaning of the term "general international law", which may connote something other than "customary international law"; the notion of a "merging of sources", which raises among other things the relationship between customary international law and "general principles of law" (art. 38.1(c) of the ICJ Statute). And it may require examination of the distinctions between rules of customary international law and "soft law"; between *lex lata* and *lex ferenda*; and between customary international law and mere usage on the one hand, and informal treaties (including treaties not in written form) and subsequent practice relating to the interpretation of treaties, on the other.

(iv) An analysis of Article 38.1(b) of the Statute of the International Court of Justice (including its *travaux préparatoires*); and of Article 38.1(c) and (d).

The *London Statement of Principles* is at *ibid.*, pp. 712–777, and the report of the Working Session of the Committee on Formation of (General) Customary International Law held in 2000 is at *ibid.*, pp. 778–790. The Committee's six interim reports contain more detailed material.

[2] *Gulf of Maine*, *I.C.J. Reports 1984*, p. 291, para. 83.

(v) Principal theories and approaches to the formation of rules of customary international law. The theoretical underpinnings of the subject are important, even though the ultimate aim will be to provide a practical aid to those called upon to investigate rules of customary international law. It will be necessary to address general questions of methodology: empirical research into State practice as well as deductive reasoning, as illustrated by some case-law of international courts and tribunals. Practical considerations may affect methodology, especially in a world of nearly 200 States.

(vi) Relevant case-law of international and national courts and tribunals.

(vii) Bibliography.

(ii) State practice and *opinio juris*

8. Having assembled the basic materials, and considered certain underlying issues, including general questions of methodology as indicated in paragraph 7(v) above, a second stage could cover some central questions of the traditional approach to the identification of rules of customary international law, in particular State practice and *opinio juris*:

(i) Identification of State practice. What counts as "State practice"? Acts and omissions, verbal and physical acts. How may States change their position on a rule of international law? Decisions of domestic courts and tribunals (and the executive's response thereto). Beyond the State, whose acts? Certain international organizations, like the European Union? "Representativeness" of State practice (including regional diversity).[3]

(ii) Nature, function and identification of *opinio juris sive necessitatis.*

(iii) Relationship between the two elements: State practice and *opinio juris sive necessitatis*, and their respective roles in the identification of customary international law.

(iv) How new rules of customary international law emerge; how unilateral measures by States may lead to the development of new rules; criteria for assessing whether deviations from a customary rule have given rise to a change in customary law; potential role of silence/acquiescence.

(v) The role of "specially affected States".

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[3] It will be recalled that at its first and second sessions in 1949/1950, the International Law Commission, in accordance with the mandate in Article 24 of its Statute, considered the topic "Ways and Means of Making the Evidence of Customary International Law More Readily Available". The outcome was an influential report, which led to various important publications, on a national and international level (*Yearbook ILC 1950, vol. II*, pp. 367–374 (Report of the ILC for 1950, document A/1316, paras. 24–94); and see *The Work of the International Law Commission* (7th ed), Part III.2). The work of the Commission in relation to State practice has been described as follows: "The International Law Commission fully recognized the importance of State practice being widely available, and its Report did much to prompt action towards that end. Two developments, however, now [this was written in 1998] threaten the full attainment of the objectives set in 1950 by the Commission: first, the enormous proliferation in the available material on the many aspects of international law and relations, and second the rising costs associated with its accumulation, storage, and distribution. With the added impact in recent years of revolutionary developments in global information technology, the subject covered by the Commission's 1950 Report might repay renewed attention." (A.D.Watts, *The International Law Commission 1949–1998*, vol. III, p. 2106.) It is suggested that the question of the access to State practice should indeed be revisited by the Commission, in parallel with the other work on customary international law covered by this syllabus.

(vi) The time element, and the density of practice; "instant" customary international law.

(vii) Whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs.

(iii) Particular topics

9. A third stage could cover particular topics, such as:

(i) The "persistent objector" theory.

(ii) Treaties and the formation of customary international law; treaties as possible evidence of customary international law; the "mutual influence"/interdependence between treaties and customary international law.

(iii) Resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

(iv) Formation and identification of rules of special customary international law between certain States (regional, subregional, local or bilateral – "individualized" rules of customary international law). Does consent play a special role in the formation of special rules of customary international law?

(iv) Conclusions

10. The final stage could consolidate the outcomes of the earlier stages, in a form suitable for consideration and adoption by the Commission.

Background materials

International Law Commission

"Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of the article 24 of the Statute of the International Law Commission", Memorandum submitted by the Secretary-General (A/CN.4/6 and Corr.1).

Working Paper prepared by the Secretariat (A/CN.4/WP.9), reproduced in the Yearbook of the International Law Commission 1949-I, pp. 228–229.

Article 24 of the Statute of the International Law Commission, Working Paper by Manley O. Hudson, Special Rapporteur (A/CN.4/16 and Add.1) (Yearbook of the International Law Commission 1950-II, pp. 24–33).

Report of the International Law Commission on the work of its second session, paras. 24–94 (Yearbook of the International Law Commission 1950-II, pp. 367–74) (Part II, Ways and Means for Making the Evidence of Customary International Law More Readily Available).

Case-law

Permanent Court of International Justice

The Case of the S.S. "Lotus" (France v. Turkey), Collection of Judgements, Judgment Nr. 9 of 7 September 1927, P.C.I.J., Series A – No. 10, p. 4 (pp. 18, 20–22 and 28).

International Court of Justice

Colombian-Peruvian Asylum case, Judgment of 20 November 1950, I.C.J. Reports 1950, p. 266 (pp. 276–278).

Reservations to the Genocide Convention case, I.C.J. Reports 1951, p. 15.

Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951, p. 116 (pp. 131 and 138–139).

Nottebohm Case (Liechtenstein v. Guatemala) (second phase), Judgment of 6 April 1955, I.C.J. Reports 1955, p. 4 (pp. 22–23).

Case concerning Right of Passage over Indian Territory (Portugal v. India) (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960, p. 6 (pp. 39–44).

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3 (paras. 60–83).

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, p. 246 (paras. 83, 90, 94, and 110–111).

Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13 (paras. 26–34, 43–44 and 77).

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 (paras. 172–192, 201–209, 211 and 273).

Frontier Dispute (Burkina Faso/Mali), Judgment of 22 December 1986 (Merits), I.C.J. Reports 1986, p. 554 (para. 21).

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), I.C.J. Reports 1993, p. 38 (para. 46).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226 (paras. 64–73, 75, 79–82, 84, 96).

Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain), I.C.J. Reports 2001, p. 40.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3 (paras. 51–59).

Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, I.C.J. Reports 2009, (paras. 140–144), and Separate Opinion of Judge Sepúlveda-Amor (paras. 20–28).

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (esp. para. 99).

Prosecutor v. Kupreskic et al. (Judgment), Trial Chamber, Judgment of 14 January 2000 (paras. 524–525, 527, 531–534 and 540).

Arbitral Tribunals

Strunski-Mergé case, Italian-United States Conciliation Commission, Decision of 10 June 1955, *ILR*, 1955, pp. 443.

Texaco-Calasiatic c. Gouvernement libyen, sentence arbitrale au fond du 19 janvier 1977, *Journal de droit international (Clunet)*, vol. 104, 1977, p. 350 (paras. 59–60, 69 and 83–89).

Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, *RIAA*, vol. XVIII, p. 3 (paras. 45–47).

International Law Association

Resolution 16/2000 (Formation of General Customary International Law), adopted on 29 July 2000 by the International Law Association: see *International Law Association, Report of the Sixty-ninth Conference, London*, p. 39.

Institut de Droit International

Resolution on "Problems Arising from a Succession of Codification Conventions on a Particular Subject", adopted on 1st September 1995.

Select bibliography

S. Seferiades, "Aperçu sur la coutume juridique internationale et notamment sur son fondement", *RGDIP*, vol. 43, 1936, pp. 129–196.

L. Koppelmanas, "Custom as a Means of Creation of International Law", *BYIL*, vol. XX, 1937, pp. 127–151.

H. Kelsen, "Théorie du droit international coutumier", *Revue internationale de la théorie du droit*, vol. 1, 1939, pp. 253–274.

N. Bobbio, *La consuetudine come fatto normativo*, Padoue, CEDAM, 1942.

P. Guggenheim, "Les deux éléments de la coutume en Droit international", in *La technique et les principes du droit public. Etudes en l'honneur de Georges Scelle*, Paris, LGDJ, 1950, t. I, pp. 275–284.

G. Barile, "La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice", *Comunicazioni e studi*, vol. V, Milan, Giuffrè, 1953.

C. De Visscher, "Coutume et traité en droit international public", *RGDIP*, vol. XX, 1955, pp. 353–269.

R. Ago, "Science juridique et droit international", *RCADI*, t. 90, 1956-II, pp. 855–954.

I.C. MacGibbon, "Customary International Law and Acquiescence", *BYIL*, vol. XXXIII, 1957, pp. 115–145.

H. Lauterpacht, *The Development of International Law by the International Court*, London, Stevens, 1958, pp. 368–393.

R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, OUP, 1963.

G. Cohen-Jonathan, "La coutume locale", *AFDI*, 1961, pp. 119–140.

C. Parry, *The Sources and Evidences of Public International Law*, Manchester University Press, 1965, pp. 56–82.

R. Baxter, "Multilateral Treaties as Evidence of Customary International law", *BYIL*, vol. XLI, 1965–66, pp. 275–300.

A. D'Amato, "The Concept of Special Custom in International law", *AJIL*, vol. 63, 1969, pp. 211–223.

A. D'Amato, *The Concept of Custom in International Law*, Londres/Ithaca, Cornell University Press, 1971.

H. Thirlway, *International Customary Law and Codification*, Leiden, A.W. Sijthoff, 1972.

A. D'Amato, *The Concept of Custom in International Law*, New York, Cornell University Press, 1973.

R.-J. Dupuy, "Coutume sage et coutume sauvage", in *Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, pp. 75–87.

M. Akehurst, "Custom as a Source of International Law", *BYIL*, vol. XLVII, 1974–75, pp. 1–53.

R.-J. Dupuy, "Droit déclaratoire et droit programmatoire: de la coutume sauvage à la *soft law*", in SFDI, *L'élaboration du droit international*, Paris, Pedone, 1975, pp. 132–148.

J. Charpentier, "Tendances de l'élaboration du droit international coutumier", in SFDI, *L'élaboration du droit international*, Paris, Pedone, 1975, pp. 105–131.

R. Jennings, "What is International Law and How Do We Tell it When We See it?", *The Cambridge-Tilburg Lectures*, Third Series, 1980, pp. 1–32.

B. Stern, "La coutume au cœur du droit international. Quelques réflexions", in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Paris, Pedone, 1981, pp. 479–499.

R.Y. Jennings, "Law-Making and the Package Deal", in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Paris, Pedone, 1981, pp. 347–355.

M. Bos, "The identification of custom in international law", *GYIL*, vol. 25, 1982, pp. 9–53.

Bin Cheng, "Custom: the Future of General State Practice in a Divided World", in R. SJ. MacDonald, D.M. Johnson, eds., *The Structure and Process of International Law*, Nijhoff, The Hague, 1983, pp. 513–554.

L. Ferrari Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des états", *RCADI*, t. 192, 1985-III, pp. 233–330.

S. Sur, "La coutume internationale. Sa vie, son œuvre", *Droits*, vol. 3, 1986, pp. 111–124.

P. Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", *RGDIP*, vol. 90, 1986, pp. 5–125.

G. Abi-Saab, "La coutume dans tous ses états ou le dilemme du droit international général dans un monde éclaté", in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. 1, pp. 53–65.

G.M. Danilenko, "The Theory of International Customary Law", *GYIL*, vol. 31, 1988, pp. 9–47.

O. Schachter, "Entangled Treaty and Custom", in: Y. Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Nijhoff, 1989, pp. 717–738.

S. Sur, *La coutume internationale* (Extrait du Juris-Classeur Droit international), Paris, LITEC, 1990.

H. Thirlway, "The Law and Procedure of the International Court of Justice, 1960–1989 (Part Two)", *BYIL*, vol. LXI, 1990, p. 1, at pp. 31–40.

J. Barberis, "Réflexions sur la coutume internationale", *AFDI*, vol. XXXVI, 1990, pp. 9–46.

L. Condorelli, "La coutume", in Mohammed Bedjaoui (Rédacteur général), *Droit international. Bilan et perspectives*, Paris, Pedone, 1991, t. I, pp. 187–221.

J. Barberis, "La coutume est-elle une source du droit international?", in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, Paris, Pedone, 1991, pp. 43–52.

M. Mendelson, "State Acts and Omissions as Explicit or Implicit Claims", in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, Paris, Pedone, 1991, pp. 373–382.

R. Bernhardt, "Customary international law" in *Encyclopedia of Public International Law*, vol. I, p. 898 (1984, 1991, with bibliography).

R. Jennings, A Watts, *Oppenheim's International Law* (9th ed.), OUP, 1992, pp. 25–31.

K. Wolfke, *Custom in Present International law* (2nd ed.), Dordrecht, Kluwer, 1993.

K. Wolfke, "Some persistent controversies regarding customary international law", *NYIL*, vol. 24, 1993, pp. 1–16.

G. Tunkin, "Is General International Law Customary Law Only?", *EJIL*, vol. 4, 1993, No. 4, pp. 534–541.

P.-M. Dupuy, "Théorie des sources et coutume en droit international contemporain", in *Le droit international dans un monde en mutation. Liber amicorum en hommage au Professeur Eduardo Jiménez de Aréchaga*, Montevideo, Fundación de cultura universitaria, 1994, vol. 1, pp. 51–68.

K. Zemanek, "What is 'State Practice' and Who Makes It?", In: *Recht Zwischen Umbruch und Bewahrung, Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt*, Berlin, Springer, 1995, pp. 289–306.

M. Mendelson, "The Subjective Element in Customary International Law", *BYIL*, vol. LXVI, 1995, pp. 177–208.

I. Lukashuk, "Customary Norms in Contemporary International Law", in *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski*, La Haye/Londres/Boston, Kluwer International Law, 1996, pp. 487–508.

O. Schachter, "New Custom: Power, *Opinio iuris* and Contrary Practice", in *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski*, La Haye/Londres/Boston, Kluwer International Law, 1996, pp. 532–540.

M. Villiger, *Customary International Law and Treaties. A Manual on Theory and Practice of the Interrelation of Sources* (2nd ed.), The Hague, Kluwer, 1997.

D.P. Fidler, "Challenging the Classical Concept of Custom: Perspective on the Future of Customary International Law", *GYIL*, vol. 39, 1996, pp. 199–248.

M. Mendelson, "The Formation of Customary International Law ", *RCADI*, vol. 272, 1998, pp. 155–410.

R. Müllerson, "On the nature and scope of customary international law", *Austrian Review of International and European Law*, vol. 2, 1998, pp. 1–19.

M. Byers, *Custom, Power and the Power of Rules*, CUP, 1999.

J. Barboza, "The Customary Rule: From Chrysalis to Butterfly", in *Liber amicorum in memoriam of Judge José Maria Ruda*, Kluwer, The Hague, 2000, pp.1–14.

G.P. Buzzini, "La théorie des sources face au droit international général : réflexions sur l'émergence du droit objectif dans l'ordre juridique international", *RGDIP*, vol. 106, 2002, pp. 581–617.

H. Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989, Supplement, 2005: Parts One and Two", *BYIL*, vol. 76, 2005, p. 1, at pp. 92–108.

H. Thirlway, in: M. Evans (ed.), *International Law* (2nd ed.), OUP, 2006, pp. 121–127.

C. Cahin, *La coutume internationale et les organisations internationales – L'incidence de la dimension institutionelle sur le processus coutumier*, Paris, Pedone, 2001.

Colloque de la SFDI, (Genève, 2003), *La pratique et le droit international*, Paris, Pedone, 2004.

J. Kammerhofer, "Uncertainty in the formal sources of international law: customary international law and some of its problems", *EJIL*, vol. 15, 2004, pp. 523–553.

T. Christakis and O. Corten, "La participation du Conseil de sécurité à l'élaboration, à la cristallisation ou à la consolidation de règles coutumières", *RBDI*, vol. 37, 2004, pp. 552–567.

G.P. Buzzini, "Abstention, silence et droit international general", *Rivista di Dizitto Internazionale*, vol. LXXXVIII, 2005, pp. 342–382.

A. Pellet, "Article 38", in: A. Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary*, OUP, 2006, pp. 748–764.

V. Lowe, *International Law*, OUP, 2007, pp. 36–63.

A. Perreau-Saussine and J. B. Murphy, *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, CUP, 2007.

M. Shaw, *International Law* (6th ed.), CUP, 2008, pp. 72–93.

H. Taki, "*Opinio Juris* and the Formation of Customary International Law", *GYIL*, vol. 51, 2008, pp. 417–446.

I. Brownlie, *Principles of Public International Law* (7th ed.), OUP, 2008, pp. 6–12.

F. Hoffmeister "The Contribution of EU Practice to International Law" in: M. Cremona (ed.) *Developments in EU External Relations Law*, OUP, 2008.

T. Treves, "Customary International Law", in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, OUP, 2008, online edition, [www.mpepil.com], visited on 29 August 2009.

P. Daillier, M. Forteau, A. Pellet, *Droit international public* (8th ed.), Paris, L.G.D.J., 2009, paras. 207–220.

B. Schlütter, *Developments in Customary International Law: Theory and Practice of the International Court of Justice and the International ad hoc Tribunals for Rwanda and Yugoslavia*, Brill, 2010.

B. Lepard, *Customary International Law: A New Theory with Practical Applications*, CUP, 2010.

B. Saul, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", *Leiden Journal of International Law*, vol. 24, 2011 pp. 677–700.

Annex B
Protection of the atmosphere
(Mr. Shinya Murase)

I. Introduction

1. The atmosphere (air mass), mostly existing in the troposphere and stratosphere, is the planet's largest single natural resource, and it is indispensable for the survival of humankind. Degradation of atmospheric conditions has long been a matter of serious concern to the international community.[1] While there have been a number of relevant conventions concluded for the protection of the transboundary and global atmosphere, these have nonetheless left substantial gaps in terms of geographical coverage, regulated activities, controlled substances, and, most importantly, the applicable principles and rules. This piecemeal approach has had particular limitations for the atmosphere, which by its very nature warrants holistic treatment. There is no convention at present which covers the whole range of environmental problems of the atmosphere in a comprehensive and systematic manner. It is therefore believed that the Commission can make a significant contribution by codifying and progressively developing the relevant legal principles and rules on the basis of State practice and jurisprudence.

2. It is important to ensure that the International Law Commission be fully engaged with the international community's present-day needs. While the Commission's draft articles on international watercourses and transboundary aquifers contain some relevant provisions regarding the protection of the environment, the Commission has not dealt with any topic in the field of international environmental law since the conclusion of the topic on liability (i.e. prevention of transboundary harm and allocation of loss), which appears to be a significant omission at a time when the world is undergoing critical environmental degradation. It is therefore proposed that the Commission consider for its future work the topic of the "Protection of the Atmosphere".

II. Rationale for the proposed topic

3. There is abundant State practice and literature on the subject. The frequently cited award of the *Trail Smelter* arbitration[2] (United States – Canada, 1938, 1941) has been the leading case on transboundary air pollution. In the 1950s, atmospheric nuclear testing manifested itself as one of the first environmental issues confronted by the international

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[1] See e.g., Alexandre Kiss & Dinah Shelton, *International Environmental Law*, 3rd ed., Transnational Publishers, 2004, pp. 555–592. See also, Philippe Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 317–390; Patricia W. Birnie, Alan E. Boyle & Catherine Redgewell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2008, pp. 335–378; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, Foundation Press, 2007, pp. 538–733; Xue Hanqin, *Transboundary Damage in International Law*, Cambridge University Press, 2003, pp. 200–203.

[2] *Reports of International Arbitral Awards*, vol. 3, pp. 1907 ff (Award of 1941). Often quoted passage of the award reads as follows: "Under the principles of international law … no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence". *Ibid.*, p. 1965.

community.[3] The *Nuclear Tests* case (Australia – France; New Zealand – France, 1973) before the International Court of Justice (ICJ) sparked heated discussions relating to possible atmospheric pollution.[4] The ICJ also referred, in its advisory opinion on the *Legality of the Use of Nuclear Weapons* in 1996, to the obligation of States to refrain from causing significant environmental damage from their transboundary pollution, including atmospheric pollution.[5] Accidents at nuclear facilities can have direct impacts on the environment of the atmosphere, as has been demonstrated by the accidents at Three Mile Island of 1979 and Chernobyl of 1986, as well as the damage to the Fukushima nuclear power plants caused by the huge earthquake and tsunami of 11 March 2011, which is currently a major concern of the international community. In the recent judgment of the *Pulp Mills on the River Uruguay* case (Argentina – Uruguay) rendered on 20 April 2010, the Court referred in part to the issue of alleged air pollution (to the extent relevant to the river's aquatic environment).[6] Furthermore, the *Aerial Herbicide Spraying* case (Ecuador v. Colombia) currently pending before the ICJ may also address the subject. The WTO case on the *United States – Standards for Reformulated and Conventional Gasoline* (1996) posed an important question of the compatibility of a country's domestic law (in this case, the U.S. Clean Air Act of 1990) with the trade provisions of the WTO/GATT.[7] Finally, relevant decisions of domestic courts may also be instructive.[8]

4. The relevant treaty and non-treaty practice includes:

- ECE Convention on Long-Range Transboundary Air Pollution (1979, entered into force 1983); Monitoring and Evaluation Protocol (1984); Sulphur Protocol (1985); NOx Protocol (1988); Volatile Organic Compounds Protocol (1991); Sulphur Protocol (1994); Aarhus Protocol on Heavy Metals (1998); Aarhus Protocol on Persistent Organic Pollutants (1998); Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-Level Ozone (1999)
- Vienna Convention for the Protection of the Ozone Layer (1985)
- Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
- EC Large Combustion Directive (1988/2001)
- U.S.-Canada Air Quality Agreement (1991)

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[3] See, for example, the *Daigo Fukuryumaru* (Lucky Dragon No. 5) incident (Japan – United States) in 1954; Shigeru Oda, "The Hydrogen Bomb Tests and International Law", *Die Friedenswarte*, vol. 53, 1956; L.F.E. Goldie, "A General View of International Environmental Law", in A.C. Kiss, ed., *The Protection of the Environment and International Law*, Workshop 1973, The Hague Academy of International Law, 1975, pp. 72–73.

[4] *Nuclear Tests* case (*Australia v. France*) (Interim Measure) 1973 ICJ Reports 99; (Jurisdiction) 1974 ICJ Reports 253; (*New Zealand v. France*) (Interim Measures) 1973 ICJ Reports 135: (Jurisdiction) 1974 ICJ Reports 457.

[5] 1996 ICJ Reports 241. The ICJ stated in its opinion: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction is now part of the corpus of international law relating to the environment."

[6] 2010 ICJ Reports 75, paras. 263–264. The issue was raised during the oral proceedings: See *Pulp Mills* case (Argentina v. Uruguay), Oral proceedings, 2006/47, paras. 22, 28 and 34.

[7] *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WT/052/8, pp. 16–17; Shinya Murase, "Unilateral Measures and the WTO Dispute Settlement", Simon S.C. Tay & Daniel C. Esty, eds., *Asian Dragons and Green Trade*, Times Academic Press, 1996, pp. 137–144.

[8] See, e.g., *Massachusetts v. EPA*, U.S. Supreme Court decision of 2 April 2007 (549 U.S. 497; 127 S. Ct. 1438; 2007 U.S. LEXIS 3785) which was in part concerned with certain obligations of the Environmental Protection Agency (EPA) to regulate emissions of greenhouse gases.

- UN Framework Convention on Climate Change (UNFCCC, 1992)
- The Kyoto Protocol to the UNFCCC (1997)
- The ASEAN Agreement on Transboundary Haze Pollution (2002)[9]
- Stockholm Declaration on Human Environment (1972)[10]
- Institut de droit international, Resolution on Transboundary Air Pollution (1987)[11]
- Rio Declaration on Environment and Development (1992)
- ILC Draft Articles on the Prevention of Transboundary Harm (2001)
- ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities (2006)

5. The rationale for the proposed project for codification and progressive development of international law is threefold: First and foremost, it is necessary to fill the gaps in the existing conventions relating to the atmosphere. The number of relevant conventions notwithstanding, they have remained a mere patchwork of instruments which cover only specific geographical areas and a limited range of regulated activities and controlled substances.[12] The incremental approach has its particular limitations for the protection of the atmosphere, which by its very nature warrants holistic treatment in the form of a framework convention by which the whole range of environmental problems of the atmosphere could be covered in a comprehensive and systematic manner. Thus, the present proposal envisages an instrument similar to Part XII of the United Nations Law of the Sea Convention (UNCLOS) on the Protection and the Preservation of the Marine Environment.

6. Second, the Commission will be expected to provide appropriate guidelines for harmonization and coordination with other treaty regimes outside international environmental law, which may come in conflict with the proposed convention during the

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[9] Not yet in force.

[10] Principle 21 of the Stockholm Declaration provides: "States have, in accordance with the Charter of the United Nations and the principles of international law, … the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." L. Sohn, "The Stockholm Declaration on the Human Environment", 14 *Harvard International Law Journal* 423 (1972).

[11] Article 2 provides: "In the exercise of their sovereign right to exploit their resources pursuant to their own environment policies, states shall be under a duty to take all appropriate and effective measures to ensure that their activities or those conducted within their jurisdiction or under their control cause no transboundary air pollution."

[12] In recent years, there has been growing scientific evidence that so-called "tropospheric ozone" and "black carbon" are the two substances in the atmosphere directly threatening *both* the air quality and climate change. It is said that, for climate change, the so-called greenhouse gases identified in the UNFCCC are responsible for only 60 %, while these substances are responsible for some 40 %. This clearly demonstrates the *linkage* between the transboundary air pollution and climate change, and also the *gap* existing in the current treaty regime which needs to be filled by a comprehensive multilateral convention on the atmosphere. See, the UNEP study, "Measures to Limit Near-Term Climate Change and Improve Air Quality: An Integrated Assessment of Black Carbon and Tropospheric Ozone", 2011 (forthcoming). It may also be noted that, for instance, Europe now struggles to meet standards for air quality as a result of the pollutants carried from other regions of the world. This is indicative of the fact that even regional air pollution problems cannot be solved without considering their causes and effects in the global framework.

compliance and implementation phases.[13] Third, it is also important that the proposed draft articles will help provide the framework for harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere. Fourth, it is hoped that the proposed project will establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere.

7. It is important to clearly distinguish between the notion of atmosphere and the notion of airspace. Article 1 of the 1944 Chicago Convention on International Civil Aviation reaffirms the rule of customary international law that "every State has complete and exclusive sovereignty over the airspace above its territory". Although the legal principles, rules and regulations envisaged in the proposed draft articles are perhaps most applicable to certain activities conducted *on the ground* within a State's territorial jurisdiction, there may be situations where the activities in question may be conducted in the airspace above.[14] In such a context, it will be appropriate for the draft articles to reaffirm State's sovereignty over national airspace. It should be noted that the present project shall in no way be intended to affect the legal status of airspace as currently established in international law.

8. The present proposal does not duplicate the previous work of the Commission. The ILC adopted Draft Articles on the Prevention of Transboundary Harm in 2001 and Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities in 2006. Both drafts contain important provisions potentially applicable to atmospheric damage. However, the scope of application of these drafts is, on the one hand, too broad (as they are intended to cover all types of environmental harm), and on the other hand too limited (as they focus on the questions related to prevention and allocation of loss caused by transboundary harm and hazardous activities). Since they do not adequately address the protection of atmospheric conditions as such, it is proposed that the Commission tackle the problem in a comprehensive and systematic manner, but, at the same time, with a specific focus on the atmosphere.

III. Physical characteristics of the atmosphere

9. In order to determine the definition, scope and objective of the exercise for codification and progressive development of international law on the protection of the atmosphere, as well as to characterize the legal status of the atmosphere, it is first necessary to understand the physical structure and characteristics of the atmosphere.

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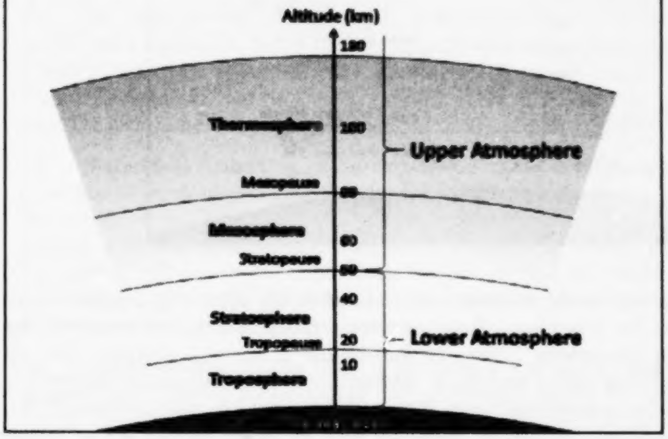
[13] See Shinya Murase, "Perspectives from International Economic Law on Transnational Environmental Issues", *Recueil des cours* de *l'Académie de droit international de La Haye*, vol. 253, 1995, pp. 283–431.

[14] The 16th Annex of the 1944 Chicago Convention on International Civil Aviation is entitled "Environmental Protection". The ICAO has established rules on the "Aircraft Engine Emissions Standards and Recommended Practices" since 1980, with a view to achieving "maximum compatibility between the safe and orderly development of civil aviation and the quality of human environment" (ICAO Assembly Resolution A18-11, para. 2). These Emission Standards establish rules, *inter alia*, for vented fuel (Part II) and emission centrification (Part III), including emissions limits for smoke and certain chemical particles.

10. The "Atmosphere" is "a mixture of gases that surrounds the earth".[15] The main components (and proportion) of gases in the atmosphere are Nitrogen (78.08%), Oxygen (20.95%), Argon (0.93%), and Carbon Dioxide (0.03%), with additional trace gases in tiny concentrations (0.01%). The atmosphere exists in what is called the atmospheric cell. It is divided vertically into four atmospheric spheres (from the lower to upper layers: troposphere, stratosphere, mesosphere and thermosphere) on the basis of the temperature characteristics (see, Figure (1)).

Figure(1): The Zonation of the Atmosphere



11. As the altitude increases, the gases in the atmosphere gradually dilute. Approximately 80% of air mass exists in the troposphere and approximately 20% in the stratosphere. In the troposphere and the stratosphere, the relative proportions of most gases are fairly stable; scientifically these spheres are grouped together as the "*lower atmosphere*", which extends to an average altitude of 50km, and are distinguished from the "*upper atmosphere*". The atmosphere moves and circulates around the earth in a complicated manner, which is called "atmospheric circulation".[16] The gravitational influence of the sun and moon also affect its movements by creating "atmospheric tides".[17]

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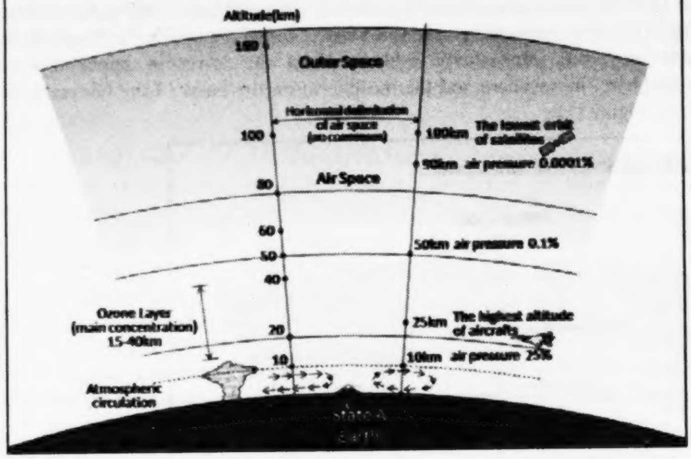
[15] *Oxford Advanced Learner's Dictionary*, seventh edition, Oxford University Press, 2005.

[16] Gareth Jones, Alan Robertson, Jean Forbes and Graham Hollier, *Collins Reference Dictionary of Environmental Science*, Collins, 1990, p. 40.

[17] Michael Allaby, *Dictionary of the Environment*, third edition, New York University Press, 1989, p. 34.

Figure(2): The Delimitation of the Atmosphere


Altitude(km)
Outer Space
Horizontal delimitation of air space (no consensus)
100
100km The lowest orbit of satellites
90km air pressure 0.0001%
Air Space
80
60
50km air pressure 0.1%
50
40
Ozone Layer (main concentration) 15-40km
20
25km The highest altitude of aircrafts
10
10km air pressure 25%
Atmospheric circulation
State A
Earth

12. Both human and natural environments can be adversely affected by certain changes in the condition of the atmosphere. There are three particularly important causes for the degradation of the atmosphere.[18] First, the introduction of harmful substances (i.e. air pollution) into the troposphere and lower stratosphere causes changes in atmospheric conditions. The major contributing causes of air pollution are acids, nitrous oxides (NOx), sulfur oxides (SOx) and hydrocarbon emissions such as carbon dioxide (CO_2). Strong horizontal winds, e.g. jet streams,[19] can quickly transport and spread these trace gases horizontally all over the globe, far from their original sources (though vertical transport is very slow). Second, chlorofluorocarbons (CFCs) and halons emitted into the upper troposphere and stratosphere cause ozone depletion. The ozone layer, as its name implies, contains significant amounts of ozone (O_3), a form of oxygen. The main concentrations of ozone are at altitudes of 15–40 km (maximum concentrations are between 20–25km). The ozone layer filters out ultraviolet radiation from the sun, which may cause skin cancer and other injuries to life. Third, changes in the composition of the troposphere and lower stratosphere cause climate change. The main cause of human-induced climate change is additional trace gases, such as carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4), chlorofluorocarbons, and tropospheric ozone (O_3). These are called "greenhouse gases".[20] Conditions within the troposphere heavily affect the weather on the earth's surface, including cloud formation, haziness, and precipitation. Most gases and aerosols are expunged by a natural "cleansing process" in the troposphere, but when emissions overwhelm this process, climate change begins to occur.

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[18] See, Hans-Jurgen Schlochauer, "Atmosphere, Protection", in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 1, 1997, p. 290.

[19] Jet streams are westerly winds (i.e. flowing from west to east) moving around the upper stratum of the troposphere. They move at a high speed of 240 to 720 kilometers per hour.

[20] In recent years, however, scientists are finding that black carbon and troposphere ozone are also responsible for climate change. See footnote 12.

13. These three main international issues concerning the atmosphere — air pollution, ozone depletion and climate change — relate to *the troposphere and the stratosphere*,[21] although major contributing factors may be different in each case. The upper atmosphere, i.e. the mesosphere and thermosphere, which comprises approximately 0.0002% of the atmosphere's total mass, is of little concern regarding the environmental problems under consideration, not to mention the vast regions of outer space where there is no air.

IV. Legal issues to be considered

14. The final outcome of this project is envisaged as a comprehensive set of draft articles for a framework convention on the protection of the atmosphere. Part XII of the United Nations Law of the Sea Convention on the Protection and the Preservation of the Marine Environment may provide an example of the form that these draft articles could take. The legal issues to be considered, among others, will be as follows:

15. **(Definition)** Embarking on the formulation of relevant principles and rules on the protection of the atmosphere, the Commission will first need to define the atmosphere. The atmosphere — or air-mass — is a mixture of gases that surrounds the earth, most of it existing in the troposphere and stratosphere. It may also be necessary to address not only the physical make-up of the atmosphere, but also its role as a medium for transporting pollutants. This definition will also clearly distinguish the notion of airspace and its distinct relevance from the definition of atmosphere.

16. **(Scope)** In clarifying the scope of the project, it should be made clear first that the proposed draft articles are addressed only to damage caused by human activities, and accordingly, their scope would not extend, for instance, to the damages caused by volcanic eruption and desert sand (unless these are exacerbated by human activity). Second, the draft articles should make clear the objects to be protected, natural and human environments, and the intrinsic relationship between the two. Third, it should be necessary to refer to the different modalities of the environmental damage in the atmosphere; one is the introduction of (deleterious) substances into the atmosphere and another the alternation in the balance of composition of the atmosphere.

17. **(Objective)** Because of its dynamic and fluctuating character, the atmosphere needs to be treated as a *single global unit* for the purpose of environmental protection. While recognizing the difference of *modalities* in legal responses between transboundary air pollution and global atmospheric problems, both should be treated within the same legal framework based on the functional notion of the atmosphere for the purpose of codification and progressive development of international law on the subject. In other words, the atmosphere should be treated comprehensively for the purpose of its environmental protection.

18. **(Legal Status of the Atmosphere)** There are at least five concepts that may be considered relevant to the legal status of the atmosphere: airspace, shared or common natural resources, common property, common heritage, and common concern (common

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[21] Alexandre Kiss and Dinah Shelton, *International Environmental Law*, 3rd ed., pp. 556–562 (Chapter 12, "Atmosphere, Stratosphere and Climate").

interest).[22] Each of these concepts should here be carefully considered as to whether and to what extent they are applicable to the protection of the atmosphere. For example, States may well wish to reaffirm their sovereignty over the atmosphere that exists within their airspace for the reasons stated above in paragraph seven.

19. **(Basic Principles for the Protection of the Atmosphere)** Applicability of the well known principles including the following will have to be considered: General Obligations of States to Protect the Atmosphere, Obligations of States vis-à-vis Other States Not to Cause Significant Harm to the Atmosphere, Principle of *sic utere tuo ut alienum non laedas* to be applicable to the activities under the "Jurisdiction or Control" of a State, General Obligations of States to Cooperate, Principle of Equity, Principle of Sustainable Development, and Common but Differentiated Obligations.

20. **(Measures of Prevention and Precaution to Protect the Atmosphere)** One of the outstanding issues in this project will be the differentiation and relationship between the traditional "Preventive" principle and the relatively new "Precautionary" principle. Preventive measures should be taken where the probable damage is foreseeable with clear causal links and proofs, whereas, in contrast, precautionary measures ought to be taken even where the damage is scientifically uncertain. Environmental impact assessment will be crucial for certain situations.

21. **(Implementation of Obligations)** Implementation of the prescribed obligations should be carried out through the domestic law of each State. Unilateral domestic measures and the effect of extraterritorial application have been sensitive issues in international environmental law. The role of relevant international organizations and the Conferences of Parties should not be overlooked. Conflict and coordination with trade law will also be particularly important.

22. **(Mechanisms for Cooperation)** Desirable procedures for cooperation, technical and other forms of cooperation, and pertinent measures for capacity building should all be explored.

23. **(Procedural Rules for Compliance)** Notification, exchange of information, consultation, reporting systems, pledge and review, promotional and enforcement procedures, among others, shall be considered.

24. **(Responsibility and Liability)** Attribution of responsibility, due diligence, liability for high-risk activities and civil liability are no doubt critical issues to be considered in connection with the State's obligations under preceding paragraphs 19 to 23.

25. **(Dispute Settlement)** While recognizing the specific nature of each dispute settlement body, questions of general nature such as jurisdiction, admissibility and standing, and proof of scientific evidence should be considered.

V. Basic approaches

26. The Commission, charged with the work of codification and progressive development of international law, will not directly engage political issues. While the topic

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[22] Alan E. Boyle, "International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles", Robin Churchill & David Freestone, eds., *International Law and Global Climate Change*, 1991, pp. 7–19; See also Jutta Brunnée, "Common Areas, Common Heritage, and Common Concern", in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds., *Oxford Handbook of International Environmental Law*, 2007, pp. 550–573.

on climate change, for instance, often inspires impassioned political and policy debate, the Commission, composed as it is of legal experts, will deal only with the *legal* principles and rules pertaining to the protection of the atmosphere rather than the development of policy proposals. In so doing, the Commission's product will take the uncoordinated legal frameworks that have heretofore been set up to handle only discrete and specific atmospheric problems and rationalize them into a single, flexible code. This synthesis will hopefully lay the groundwork for a future convention covering substantive issues, and in the meantime help States, international organizations, and civil society at large in clarifying the legal implications of their activities in this field.

27. It is important that the legal principles and rules on the subject are considered by the Commission within the framework of *general international law*. This implies that the work of the Commission should resist the tendency toward "fragmentation" caused by dominant "single-issue" approaches to international environmental law. In other words, the legal principles and rules on the atmosphere should, as far as possible, be considered in relation to doctrines and jurisprudence of general international law. It also implies that the work of the Commission should extend to applying the principles and rules of general international law to various aspects of the problem pertaining to the protection of the atmosphere.

VI. Cooperation with other bodies

28. Cooperation with other bodies is conceivable in various ways for conducting a study and elaborating draft articles on the protection of the atmosphere. The International Law Association (ILA), among others, has conducted a number of studies relating to the present subject. The author conducted preliminary informal consultations with the legal experts of the United Nations Environmental Programme (UNEP) in Nairobi in January 2011. He also held preliminary consultations in July 2011 at the International Environmental House in Geneva with the experts of Geneva-based international environmental organizations and several secretariats of multilateral environmental agreements.

Selected bibliography

1. Judicial decisions

Trail Smelter Arbitration (US v. UK), *Reports of International Arbitral Awards*, vol.3, pp. 1907 ff (Award of 1941).

Nuclear Tests case (Australia v. France) (Interim Measure) 1973 ICJ Reports 99; (Jurisdiction) 1974 ICJ Reports 253; (New Zealand v. France) (Interim Measures) 1973 ICJ Reports 135: (Jurisdiction) 1974 ICJ Reports 457.

Legality of the Use of Nuclear Weapons case, 1996 ICJ Reports 241.

Pulp Mills case (Argentina v. Uruguay), 2010 ICJ Reports 75.

Aerial Spraying of Herbicides case (Ecuador v. Columbia), pending before ICJ.

United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, 29 April 1996, WT/052/8.

Massachusetts v. EPA, U.S. Supreme Court decision of 2 April 2007 (549 U.S. 497; 127 S. Ct. 1438; 2007 U.S. LEXIS 3785).

2. Documents of international organizations/conferences relating to the Law of the Atmosphere

"International Conference on the Changing Atmosphere: Implications for Global Security, Conference Statement, Toronto, 27–30 June 1988", 18 *Environmental Policy and Law*, 1988, pp. 155, 187–189.

"Protection of the Atmosphere: Statement of the International Meeting of Legal and Policy Experts, Ottawa, February 22, 1989", *American University Journal of International Law and Policy*, 1989, pp. 529–542.

"Protection of the Atmosphere", Report of the Secretary-General, E/CN.17/2001/PC/12, 2 March 2001.

"One Atmosphere", Vancouver Declaration of the World Clean Air Congress, September 2010 (http://www.iuappa.com/newsletters/VancouverDeclaration.pdf).

3. Literature

(1) *Law of the Atmosphere*

(a) Books

Frank Biermann, *Saving the atmosphere: international law, developing countries and air pollution*, 1995.

Patricia W. Birnie, Alan E. Boyle & Catherine Redgewell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2008, pp. 335–378.

Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007 (Ian H. Rowlands, "Atmosphere and Outer Space", pp. 315–336).

Derek M. Elsom, *Atmospheric Pollution: A Global Problem*, 2nd ed., Wiley-Blackwell, 1992.

Alexander Gillespie, *Climate Change, Ozone Depletion and Air Pollution: Legal Commentaries within the Context of Science and Policy*, Martinus Nijhoff Publishers, 2005.

David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, Foundation Press, 2007, pp. 538–733.

Alexandre Kiss & Dinah Shelton, *International Environmental Law*, 3rd ed., Transnational Publishers 2004, pp. 555–592 .

Shinya Murase, *International Law: An Integrative Perspective on Transboundary Issues*, Sophia University Press, 2011.

Lavanya Rajamani, *Differential Treatment under International Environmental Law*, Oxford University Press, 2006.

Philippe Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 317–390.

M. Soroos, *The Endangered Atmosphere: Preserving a Global Commons*, 1997.

Xue, Hanqin, *Transboundary Damage in International Law*, Cambridge University Press, 2003, pp. 200–203.

(b) Articles

Frank Biermann, "'Common Concern of Humankind': The Emergence of a New Concept of International Environmental Law", *Archiv des Völkerrechts*, 34. Band, 4. Heft, 1996, pp. 426–481.

Alan E. Boyle, "International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles", Robin Churchill & David Freestone, eds., *International Law and Global Climate Change*, 1991, pp. 7–19.

Ian Brownlie, "Legal Status of Natural Resources in International Law", 162 *Recueil des cours à l'Académie de droit international de La Haye*, pp. 245–318 (1979).

Jim Bruce, "Law of the Air: A Conceptual Outline", 18 *Environmental Policy and Law*, 1988, p. 5.

L.F.E. Goldie, "A General View of International Environmental Law", in A.C. Kiss, ed., *The Protection of the Environment and International Law*, Workshop 1973, The Hague Academy of International Law, 1975, pp. 72–73.

Günther Handl, "International Law and Protection of the Atmosphere", 83 *Proceedings of the ASIL Annual Meeting* 62, (1989).

Günther Handl, "International Efforts to Protect the Global Atmosphere: A Case of Too Little, Too Late", 1 *European Journal of International Law* 250 (1990).

John C. Hogan, "Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere", 51 *American Journal of International Law* (1957), pp. 362–375.

Alexandre Charles Kiss, "La protection de l'atmosphère: un exemple de la mondialisation des problèmes", 34 *Annuaire français de droit international* 701 (1988).

Janna Lehmann, "A Comparative Analysis of the Long-Range Transboundary Air Pollution, Ozone Layer Protection and Climate Change Regimes", in Michael Bothe and Eckard Rehbinder (eds.), *Climate Change Policy*, Eleven International Publishing, 2006, pp. 73–102.

Shinya Murase, "Perspectives from International Economic Law on Transnational Environmental Issues", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 253, 1995, pp. 283–431.

Shinya Murase, "Protection of the Atmosphere and International Lawmaking", European Law Faculty of Nova Gorica, ed., *The Challenges of Contemporary International Law and International Relations* (Festschrift for Prof. Dr. Ernest Petrič), 2011 (forthcoming).

F. Sherwood Rawland, "Atmospheric Changes Caused by Human Activities: From Science to Regulation", 27 *Ecology Law Quarterly* 1261 (2001).

Peter Sand, "UNCED and the Development of International Environmental Law", *Yearbook of International Environmental Law*, vol. 3, 1992, pp. 3–17.

Marvin S. Soroos, "The thin blue line: preserving the atmosphere as a global commons", Environment, vol. 40(2) (1998), pp. 6–13, 32–35.

Hans-Jurgen Schlochauer, "Atmosphere, Protection", in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 1, 1997, p. 290.

L. Sohn, "The Stockholm Declaration on the Human Environment", 14 *Harvard International Law Journal* 423 (1972).

(2) *Transboundary air pollution*

(a) Books

Jutta Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation*, Transnational Publishers, 1988.

John E. Carroll, *Trans-boundary Air Quality Relations*, University of Maine Press, 1990.

Cees Flinterman, Barbara Kwiatkowska and Johan G. Lammers, eds., *Transboundary air pollution: international legal aspects of the co-operation of states* 1986.

Irene H. van Lier, *Acid Rain and International Law*, Bunsel Environmental Consultants, 1981.

P.N. Okowa, *The Legal Framework for the Protection of the Environment against Transboundary Air Pollution: a Reflection on Customary and Treaty Law*, Eleven, 2009.

Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, Oxford University Press, 2000.

Philippe Sands, ed., *Chernobyl: law and communication: transboundary nuclear air pollution: the legal materials*, Grotius Publication, 1988.

(b) Articles

Nigel Bankes and J.O. Saunders, "Acid Rain: Multilateral and Bilateral Approaches to Transboundary Pollution under International Law", 33 *University of New Brunswick Law Journal* 155 (1984).

C.R. Bath, "US-Mexico Experience in Managing Transboundary Air Resources: Problems, Prospects and Recommendations for the Future", 22 *Natural Resources Journal* 1197 (1982).

Robin R. Churchill, G. Kütting and L. M. Warren, "The 1994 UN ECE Sulphur Protocol", 7 *Journal of Environmental Law* 169 (1995).

Amy A. Fraenkel, "The Convention on Long-range Transboundary Air Pollution: Meeting the Challenge of International Cooperation", 30 *Harvard International Law Journal* 447 (1989).

Scott A. Hajost, "International Legal Implications of United States Policy on Acid Deposition", in Daniel Barstow Magraw (ed.), *International Law and Pollution*, University of Pennsylvania Press, 1991, p. 344.

J.G. Lammers, "The European Approach to Acid Rain", in Daniel Barstow Magraw (ed.), *International Law and Pollution*, University of Pennsylvania Press, 1991, p. 265.

Pierre-François Mercure, "Principes de droit international applicable au phénomènes des pluies acides", 21 *Revue de droit de l'Université de Sherbrooke* 373 (1991).

Phoebe N. Okowa, "The Legacy of Trail Smelter in the Field of Transboundary Air Pollution", in Rebecca M. Bratspies and Russell A. Miller (eds.), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, Cambridge University Press, 2006.

Marc Pallemaerts, "International Legal Aspects of Long-range Transboundary Air Pollution", 1 *Hague Yearbook of International Law* 189 (1988).

Armin Rosencrantz, "The ECE Convention of 1979 on Long Range Transboundary Air Pollution", 75 *American Journal of International Law* 975 (1981).

P.J. Sands, "The Treaty Regime on Long-range Transboundary Air Pollution", in Ministere de l'Environnement & Environnement sans Frontière, France (éd.), *L'application renforcée du droit international de l'environnement: harmonisation et développement des procédures internationales de contrôle, de sanction et de règlement des différends = Towards Strengthening Application of International Environmental Law: International Procedures of Control, Enforcement and Conflict Settlement: Harmonization and Advancement*, Frison-Roche, 1999, pp. 74–78.

Alan Khee-Jin Tan, "Forest fires of Indonesia: State responsibility and international liability", *International and Comparative Law Quarterly*, vol. 48(4) (1999), pp. 826–855.

Gregory S. Wetstone, "Armin Rosencrantz and Sarah Foster", *Acid Rain in Europe and North America: National Responses to an International Problem*, Environmental Law Institute, 1983.

G.S. Wetstone and A. Rosencrantz, "Transboundary Air Pollution: The Search for an International Response", 8 *Harvard Environmental Law Review* 89 (1984).

Jørgen Wettestad, "Acid Lessons? Assessing and Explaining LRTAP Implementation and Effectiveness", *IIASA Working Paper* (WP-96-18), 1996.

Jørgen Wettestad, "Science, Politics and Institutional Design: Some Initial Notes on the Long Range Transboundary Air Pollution Regime", 4 *Journal of Environment and Development* 165 (1995).

(3) Ozone layer

(a) Books

Richard Elliot Benedick, *Ozone Diplomacy*, 2nd ed., Harvard University Press, 1998.

United Nations Environment Programme, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*, 5th ed., 2000.

Osamu Yoshida, *The International Legal Regime for the Protection of the Stratospheric Ozone Layer*, Martinus Nijhoff, 2001.

(b) Articles

R.E. Benedick, "The Montreal Ozone Treaty: Implications for Global Warming", 5 *American University Journal of International Law and Policy* 217 (1990).

Duncan Brack, *International Trade and the Montreal Protocol*, The Royal Institute of International Affairs, 1996.

Jutta Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation*, Transnational Publishers, 1988.

David D. Caron, "La Protection de la couche d'ozone stratosphérique et la structure de l'activité normative internationale en matière d'environnement", 36 *Annuaire français de droit international* 704 (1990).

David D. Caron, "Protection of Stratospheric Ozone Layer and the Structure of International Environmental Law-Making", 14 *Hastings International and Comparative Law Review* 755 (1991).

Peter M. Haas, "Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone", 46 *International Organization* 187 (1991).

John Warren Kindt and Samuel Pyeatt Menefee, "The Vexing Problem of Ozone Depletion in International Environmental Law and Policy", 24 *Texas International Law Journal* 261 (1989).

Martti Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", 3 *Yearbook of International Environmental Law* 123 (1992).

Johan G. Lammers, "Efforts to Develop a Protocol on Chlorofluorocarbons to the Vienna Convention for the Protection of the Ozone Layer", 1 *Hague Yearbook of International Law* 255 (1988).

Peter M. Lawrence, "International Legal Regulation for Protection of the Ozone Layer: Some Problems of Implementation", 2 *Journal of Environmental Law* 17 (1990).

Joel Mintz, "Progress Toward a Healthy Sky: An Assessment of the London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer", 16 *Yale Journal of International Law* 571 (1991).

James T.B. Tripp, "The UNEP Montreal Protocol: Industrialized and Developing Countries Sharing the Responsibility for Protecting the Stratospheric Ozone Layer", 20 *New York University Journal of International Law and Policy* 733 (1988).

(4) Climate change

(a) Books

R.E. Benedick *et al.* (eds.), *Greenhouse Warming: Negotiating a Global Regime*, World Resources Institute, 1991.

R.R. Churchill and D. Freestone (eds.), *International Law and Global Climate Change*, Graham & Trotman, 1991.

IPCC, *Climate Change 2007: Mitigation of Climate Change*, Cambridge University Press, 2007.

Toru Iwama, ed., *Policies and Laws on Global Warming: International and Comparative Analysis*, Environmental Research Center, 1991.

Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*, Martinus Nijhoff Publishers, 2005.

(b) Articles

Elizabeth P. Barratt-Brown *et al.*, "A Forum for Action on Global Warming: The UN Framework Convention on Climate Change", 4 *Colorado Journal of International Law and Policy* 103 (1993).

Daniel Bodansky, "The United Nations Framework Climate Change Convention: A Commentary", 18 *Yale Journal of International Law* 451 (1993).

Daniel Bodansky, "Managing Climate Change", 3 *Yearbook of International Environmental Law* 60 (1992).

Laurence Boisson de Chazournes, "De Kyoto à La Haye, en passant par Buenos Aires et Bonn: La régulation de l'effet de serre aux forceps", 1 *Annuaire français de relations internationales* 709 (2000).

D.D. Caron, "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level", 17 *Ecology Law Quarterly* 621 (1991).

Peter G.G. Davies, "Global Warming and the Kyoto Protocol", 47 *International & Comparative Law Quarterly* 446 (1998).

Sean Fox, "Responding to Climate Change: The Case for Unilateral Measures to Protect the Global Atmosphere", 84 *Georgetown Law Journal* 249 (1996).

Duncan French, "1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change", 10 *Journal of Environmental Law* 227 (1998).

Japan Branch Committee on the Legal Principles relating to Climate Change, "Preliminary Issues on the Methodology and Scope of the Work", *Japanese Yearbook of International Law*, vol. 52, 2009, pp. 500–537.

International Law Association (ILA), Committee on the Legal Principles relating to Climate Change, *First Report*, 2010, pp. 37 ff. (Available at http://www.ila-hq.org/en/committees/index.cfm/cid/1029.).

Ved P. Nanda, "Global Warming and International Environmental Law: A Preliminary Inquiry", 30 *Harvard International Law Journal* 375 (1989).

Philippe Joseph Sands, "The United Nations Framework Convention on Climate Change", 1 *Review of European Community & International Environmental Law* 270 (1992).

Christopher D. Stone, "Beyond Rio: 'Insuring' Against Global Warming", 86 *American Journal of International Law* 445 (1992).

Christina Voigt, "State Responsibility for Climate Change Damages", 77 *Nordic Journal of International Law* 1 (2008).

Durwood Zaelke and James Cameron, "Global Warming and Climate Change: An Overview of International Legal Process", 5 *American University Journal of International Law and Policy* 248 (1990).

Annex C
Provisional application of treaties
(Mr. Giorgio Gaja)

Introduction

1. Treaty clauses concerning the application of treaties that include them show a remarkable variety.

According to Article 24, paragraph 1, of the Vienna Convention on the Law of Treaties of 1969,[1] "a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree"; paragraph 2 of the same article sets out, a residual rule, that: "Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States". It is clear that provisional application of a treaty, which is considered in article 25 of the Vienna Convention, concerns the application of the treaty before it enters into force within the meaning of article 24. It is equally clear that provisional application is something short of entry into force.

The interest to advance the application of a treaty may depend on a number of reasons. One is the perceived need for matters covered by the treaty to be dealt with urgently. For instance, the IAEA Convention on the Early Notification of a Nuclear Accident of 1986,[2] which was adopted in the aftermath of the Chernobyl accident, provided for its provisional application in article 13. Another reason for resorting to provisional application is to obviate the risk that the entry into force of a treaty be unduly delayed. An example may be taken from article 7 of Protocol No. 14-bis to the European Convention on Human Rights.[3]

Article 25 of the Vienna Convention considers that provisional application of a treaty is based on the agreement of the States concerned. Paragraph 1 states that "A treaty or part of a treaty is applied provisionally pending its entry into force if (*a*) the treaty itself so provides; or (*b*) the negotiating States have in some other manner so agreed". The latter case is that of an agreement specifically directed to determine provisional application, as the Protocol relating to GATT '47.[4] The first case also refers to an agreement; although it is expressed in a treaty which is not yet in force, it operates irrespective of the entry into force of the treaty. One could apply to a treaty clause concerning provisional application article 24, paragraph 4, of the Vienna Convention, which reads as follows: "The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and *other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of the text.*" (italics added).

2. Neither article 2 of the Vienna Convention on the "use of term" nor article 25 of the same Convention contains a definition of "provisional application". This term had not been used in the draft articles prepared by the International Law Commission. It is essential to

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[1] United Nations, *Treaty Series*, vol. 1155, p. 331.

[2] United Nations, *Treaty Series*, vol. 1439, p. 276.

[3] Strasbourg, 27 May 2009, Council of Europe, *Treaty Series*, No. 204.

[4] Geneva, 30 October 1947, United Nations, *Treaty Series*, vol. 55, p. 308.

define what provisional application consists of in order to determine its legal effects and consider certain issues that the Vienna Convention addresses only in part: the preconditions of provisional application and its termination. These matters will be illustrated in the following paragraphs.

3. To simplify the analysis, the present paper only considers treaties between States, including those that establish an international organization. Thus only the Vienna Convention of 1969 is referred to here. However, similar problems arise when a treaty is concluded by an international organization either with States or with other international organizations. It is noteworthy that article 25 of the Vienna Convention of 1986 is merely an adaptation of article 25 of the 1969 Convention.

Meaning of provisional application

4. Identifying the basis of provisional application in an agreement between States does not necessarily imply that the agreement has a precise content. States may give a variety of legal effects to their agreements. In the absence of a specification of those effects by the parties to an agreement, different views have been expressed on the meaning of provisional application.

According to one opinion, the States concerned are bound by the agreement to apply the treaty in the same way as if the treaty had entered into force. Following this view, the agreement on provisional application represents a parallel engagement to the treaty. The main peculiarity of this agreement is a greater flexibility concerning termination.

The opposite view is that by agreeing to the provisional application of a treaty States are not bound to apply the treaty. They merely express the intention to apply it on the understanding that the other States concerned will do the same. Should, however, one State fail to apply the treaty provisionally, it would not incur international responsibility towards the other States. These would probably terminate, for lack of reciprocity, their provisional application of the treaty with regard to the deviating State. One reason suggested for this solution is that the agreement on provisional application may be concluded by a State organ that does not have the power to bind the State to the treaty under internal law.

A third opinion is a variation of the second one. While States are not bound to apply the treaty, the agreement on provisional application entitles them to disregard, if they do so in compliance with the treaty, obligations that they may have in their reciprocal relations under international law.

A fourth opinion considers the agreement on provisional application as an indication that the entry into force of the treaty, when and if it occurs, will be retrospective. Until the treaty enters into force, the States concerned are not bound by the treaty but, if they do not comply with its provisions, they risk being found eventually in breach of the treaty.

5. Four recent arbitration decisions concerning the Energy Charter Treaty (ECT) dwell on the meaning of provisional application under article 45 (1) of that Treaty.[5] In *Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18) the decision was given on 6 July 2007.[6] The arbitral tribunal considered that provisional application is "not the same as entry

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[5] Article 45 (1) of the ECT: "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." United Nations, *Treaty Series*, vol. 2080, p. 100.

[6] Decision on jurisdiction of 6 July 2007, http://ita.law.uvic.ca/documents/Kardassopoulos-jurisdiction.pdf.

into force. But the ECT's provisional application is a course to which each signatory 'agrees' in Article 45 (1): it is (subject to other provisions of the paragraph) thus a matter of legal obligation" (para. 209). According to this tribunal, "the language used in Article 45 (1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so" (para. 211). In the Tribunal's view there was "a sufficiently well-established practice of provisional application of treaties to generate a generally accepted understanding of what is meant by that notion" (para. 219).

A similar opinion on the meaning of provisional application in the ECT was expressed by the arbitration tribunals in *Yukos v. Russian Federation* (PCA Case No. AA 227), *Veteran Petroleum Ltd. v. Russian Federation* (PCA Case No. AA228) and *Hulley Enterprises Ltd. v. Russian Federation* (PCA Case No. AA 226). These decisions, rendered by the same panel on the same date (30 November 2009),[7] quoted approvingly at length the decision in *Kardassopoulos v. Georgia*. They also asserted "the principle that provisional application of a treaty creates binding obligations" (para. 314 of each of these three decisions).

An in-depth analysis of international decisions and of State practice should allow the International Law Commission to establish a presumption concerning the meaning of provisional application of a treaty.

The preconditions of provisional application

6. The definition of the meaning of provisional application of a treaty has some important implications with regard to its preconditions, which would need to be discussed on the basis of the conclusions reached about the definition. Should one follow the second or the fourth opinion referred to above, the agreement on provisional application would not have as such any legal effect and should not raise any question concerning the internal law concerning competence to conclude a treaty.

Should one, on the contrary, view the agreement on provisional application as implying that the States concerned are bound to apply the treaty, the internal law relating to the conclusion of executive agreements becomes relevant. The constitutions of certain States even prohibit the conclusion of agreements providing for provisional application of treaties.[8] A full assimilation between agreements on provisional application and executive agreements is prevented by the greater flexibility that the former agreements have with regard to termination.

The third opinion may also raise some questions concerning the internal law on competence to conclude treaties insofar as the non-compliance with existing obligations under international law does not come within the competence of the State authorities which concluded the agreement on provisional application.

Termination of provisional application

7. Article 25, paragraph 2, of the Vienna Convention sets out that, "unless the treaty otherwise provides or the negotiating States have otherwise agreed", "the provisional application of a treaty or part of a treaty with respect to a State shall be terminated if that

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[7] Interim Awards on Jurisdiction and Admissibility of 30 November 2009, www.arbitration.fr.

[8] Constitutional provisions are referred to in the reservations made by certain States (Colombia, Costa Rica, Guatemala and Peru) to article 25 of the Vienna Convention, A similar concern appears to underlie the reservation made to the same article by Brazil, http://untreaty.un.org.

State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty". Practice shows that States sometimes resort to termination of provisional application without specifying that they intend not to become a party to the treaty. This is probably due to the fact that the required specification is of little significance, since the notification by a State of its intention not to become a party to a treaty does not prevent the same State from later becoming a party to the treaty.

8. A question that may need to be addressed is whether, before notifying termination, a State should give notice. Although rare in practice, a notice would have the advantage of making it possible for all the parties to the agreement on provisional application of a treaty to terminate it at the same time.

9. Although the Vienna Convention does not specify it, it is clear that provisional application also terminates when the treaty enters into force. The provisions in the Vienna Convention concerning termination of treaties appear to be generally relevant for the agreement on provisional application. The ground set out in article 54 is particularly important, since it concerns termination "by consent of all the parties". Should the agreement on provisional application be viewed as imposing obligations on the States concerned, article 60 would also be relevant insofar as it provides for the possibility that a material breach may be invoked to terminate the treaty.

10. The Vienna Convention does not specify the consequences of termination of an agreement on provisional application of a treaty. One could envisage that article 70 of the Vienna Convention, which considers consequences of termination of a treaty in general, also applies to an agreement on provisional application. According to that article, termination "(*a*) releases the parties from any obligations further to perform the treaty, (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". One further question would be whether breaches of obligations under rules of international law which occurred on the basis of the provisional application of a treaty entail international responsibility once the provisional application terminates.

Conclusions

11. A study by the International Law Commission based on a thorough analysis of practice would elucidate the issues considered in the preceding paragraphs. This study may lead to the drafting of a few articles that would supplement the scant rules contained in the Vienna Convention. These articles could address in return the meaning of provisional application, its preconditions and its termination.

12. The Commission could also elaborate some model clauses which would be of assistance to States intending to give a special meaning to the provisional application of a treaty or set out particular rules on its preconditions or termination.

Select bibliography

Rudolf Bernhardt, "Völkerrechtliche Bindungen in den Vorstadien des Vertragsschlusses", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 18 (1957–8) 652–690.

Horst-Günther Krenzler, *Die vorläufige Anwendung völkerrechtlicher Verträge* (dissertation Heidelberg, 1963).

Daniel Vignes, "Une notion ambiguë: la mise en application provisoire des traits", *Annuaire Français de Droit International* 18 (1972) 181–199.

Paolo Picone, *L'applicazione in via provvisoria degli accordi internazionali* (Jovene, Napoli, 1973).

Frank Montag, *Völkerrechtliche Verträge mit vorläufigen Wirkungen* (Duncker & Humblot, Berlin, 1985).

Martin A. Rogoff, Barbara E. Gauditz, "The Provisional Application of International Agreements", *Maine Law Review* 39 (1987) 29–81.

René Lefeber, "The Provisional Application of Treaties", in: Jan Klabbers, René Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff, The Hague, 1998) 81–95.

Albane Geslin, *La mise en application provisoire des traités* (Pedone, Paris, 2005).

Denise Mathy, "article 25", in: Olivier Corten, Pierre Klein (eds), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Bruylant, Bruxelles, 2006) 1047–1070.

Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden/Boston, 2009) 349–358.

Mahnoush H. Arsanjani, W. Michael Reisman, "Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards", in: Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, Oxford, 2011) 85–102.

Denise Mathy, "Article 25 (1969)", in: Olivier Corten, Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, Oxford, 2011), 639–654.

Annex D

The fair and equitable treatment standard in international investment law

(Mr. Stephen C. Vasciannie)

I. Context

1. International investment issues have played an increasingly important role in inter-State relations in the period since World War II. Thus, today, Public International Law recognizes a number of concepts that clarify relations between and among States in investment matters; it also incorporates various concepts that set out relationships between States, on the one hand, and foreign investors, on the other. One such concept, applicable to States in their relations *inter se*, and to relations between States and foreign investors, is that of fair and equitable treatment. It is proposed that the International Law Commission should undertake an examination of the concept of fair and equitable treatment in international investment law.

2. In recent years, the concept of fair and equitable treatment has assumed considerable prominence in the practice of States. This position of prominence is owed in large part to the emergence of bilateral investment treaties as the main sources of law in the field of investment. There are currently more than 3,000 bilateral investment treaties in force between States, with the vast majority setting out treaty obligations between developed, capital-exporting countries, on one hand, and developing, capital-importing countries, on the other. Almost all of these treaties expressly incorporate a reference to the fair and equitable treatment standard in a form which assures foreign investors that they will receive fair and equitable treatment from the host country of the foreign investment. At the same time, the fair and equitable treatment standard has also had a place in other areas of State practice. So, for example, the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), the Colonia Protocol on Reciprocal Promotion and Protection of Investments within MERCOSUR, the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA), the Protocol on Promotion and Protection of Investments coming from States not Parties to MERCOSUR, the Energy Charter, the ASEAN Treaty for the Promotion and Protection of Investments, and the North American Free Trade Agreement all incorporate the fair and equitable standard as one of the means by which foreign investments are to be protected.

3. In addition, the standard of fair and equitable treatment has also been supported by States in negotiations which have not resulted in treaties. One of the earliest references to the standard of equitable treatment in investment relations is to be found in the Havana Charter for an International Trade Organization (1948). Although this treaty did not enter into force, its failure has not been attributed to the acceptance of the fair and equitable treatment standard. Other draft treaties incorporating the standard have included the Economic Agreement of Bogota (1948), the Draft Convention on Investments Abroad (1959), and the OECD Draft Convention on the Protection of Foreign Property (1967). Similarly, the Draft United Nations Code of Conduct on Transnational Corporations, negotiated initially against the backdrop of the effort to introduce a New International Economic Order in the decade of the 1970s, incorporated the fair and equitable treatment standard. The OECD Draft Multilateral Agreement on Investment, negotiated by OECD member States only, also incorporated the standard.

4. There is also support for the concept of fair and equitable treatment in the work of some international organizations and non-governmental organizations. Thus, with respect to the former, the World Bank, in its 1992 Guidelines on Treatment of Foreign Direct Investment, expressly recommended the standard. With respect to the latter, in 1949, the International Chamber of Commerce (the ICC) in its International Code of Fair Treatment for Foreign Investments supported the idea of fair treatment by identifying some of the putative elements of this standard. Subsequently, in 1972, the ICC, in its Guidelines for International Investment, referred to the need to ensure "fair and equitable treatment" for the property of foreign investors. The Pacific Basin Charter on International investments, approved by the Pacific Basin Economic Council in 1995, also supported the idea that "fair and reasonable" treatment should be granted to foreign investments as a matter of law.

5. At various levels, therefore, the practice of States and other entities, acknowledges the significance of the fair and equitable treatment standard in International Law. Notwithstanding the prominence of this standard, however, the meaning and scope of fair and equitable treatment remain controversial. In the first place, although States have entered into numerous treaties incorporating the standard, it is not altogether clear what States intend to incorporate in the treaty by the use of this form of words. Secondly, States have not always incorporated the fair and equitable treatment standard in the same way in their investment treaties: this prompts questions as to whether divergent formulations have been used to capture different possible meanings of the expression. And, thirdly, because the form of words "fair and equitable treatment" is inherently broad, uncertainty has arisen over how the standard is to be applied in practice.

6. Against this background, it is not surprising that questions concerning the meaning and scope of the fair and equitable treatment standard have become the subject of a fair degree of litigation in recent years. These cases have been largely decided by arbitral tribunals, which have sought to give meaning to the standard, as set out in particular bilateral investment treaties or in the NAFTA Agreement. In light of the approach suggested in one arbitral decision, the NAFTA Free Trade Commission took the opportunity to issue a clarification as to the meaning of the phrase "fair and equitable treatment" as used in the NAFTA Agreement. But even following this clarification, uncertainty remains on the meaning of the phrase. In light of this uncertainty, there is scope for the International Law Commission to offer an analysis of the fair and equitable treatment standard which helps to clarify the law and to lend greater certainty to the State practice on the subject. The objective will not be to seek to decide these cases anew, but rather, to extract from the cases an assessment of the state of the law concerning the meaning and components of the fair and equitable treatment standard in investment relations. Some of the cases that will need to be considered in this analysis are set out in the Table of Cases at Appendix II to this Prospectus.

II. Some issues for consideration

7. The central question to be considered will be the meaning of the concept of fair and equitable treatment as used in international investment instruments. In response to this question, it is proposed that the following issues should be considered:

(a) *Form.* What are the different forms in which the fair and equitable standard has been incorporated into bilateral and multilateral instruments? In some instances, the fair and equitable treatment is stated as a free-standing concept, while in others, it is combined, sometimes in the same operative provision, with other standards of treatment for investors, such as "full protection and security", "treatment required by international law", "most favoured nation treatment" and "national treatment". In some instances, the fair and equitable treatment is incorporated in a non-binding form, and occasionally it is included in instruments as a preambular provision. The study will therefore need to address these different forms, and assess the extent to which the different forms may give rise to different legal consequences.

(b) *Relationship with Contingent Standards.* In the vast majority of bilateral investment treaties, foreign investors are given the assurance not only of fair and equitable treatment, but also of most-favoured-nation treatment and national treatment. These standards are different from each other, with the latter two being contingent standards, meaning that their content in particular cases is determined by the treatment offered to a defined category of investors. The fair and equitable standard is a non-contingent standard, but in practice, the treatment given to an investor may be fair or unfair depending on how other investors are treated in the host country. The question, then, is whether we may define the relationship between the fair and equitable standard and other standards in a treaty. As part of this, consideration should also be given to the identification of what, in particular, a provision on fair and equitable treatment actually adds to a treaty that also incorporates the contingent standards of most-favoured nation treatment and national treatment.

(c) *Relationship with "Full Protection and Security".* As noted above, the fair and equitable treatment standard is often incorporated with the standard of "full protection and security". The analysis proposed here will consider the relationship between these two non-contingent standards. This will require an analysis of the meaning of the concept of full protection and security and an assessment of whether this concept actually incorporates elements of protection to foreign investors that are not already inherent in the fair and equitable standard of treatment.

(d) *Is fair and equitable treatment synonymous with the International Minimum Standard?* One view in the literature of fair and equitable treatment (and to some extent in the jurisprudence on the concept) is that the fair and equitable treatment standard is really the same as the international minimum standard that is regarded by some States as the standard of treatment required for the treatment of foreign investors as a matter of customary international law. The international minimum standard, as stated for example in the *Neer Claim*, has arguably not been accepted by a significant number of States. Traditionally, Latin American countries have maintained that customary international law requires the host State to accord the foreign investor treatment no less favourable than that accorded to national investors. Therefore, if the fair and equitable treatment standard is synonymous with the international minimum standard, Latin American countries will, to a significant extent, now be party to several treaties that require them to give investors the international minimum standard, whether or not that standard is required under customary international law.

(e) *Is Fair and Equitable Treatment an Independent Standard?* The study will also consider an alternative view concerning the meaning of the fair and equitable standard to that mentioned in the preceding sub-paragraph (d). The alternative view is that the fair and equitable treatment standard is an independent standard which, on the plain meaning of words, is different from the international minimum standard. In this view, the plain meaning of words requires States that assure investors fair and equitable treatment to give to those investors treatment that is not unfair and not inequitable in all the circumstances under consideration. On this reading, the standard will require arbitrators to assess the treatment accorded to the foreign investor in light of all the circumstances of the case. The elements of what is fair and equitable in this approach will be developed on a case-by-case basis.

(f) *Does the Fair and Equitable Treatment Standard Now Represent Customary International Law?* Given that more than 3,000 bilateral investment treaties incorporate the fair and equitable treatment standard, and bearing in mind that various multilateral instruments rely on the provision, the question arises whether this standard is now a part of Customary International Law. This question arises whether or not the standard is synonymous with the international minimum standard, largely from the practice of States. The International Law Commission is expected to embark upon a study on the formation and evidence of Customary International Law, so some of the tools of analysis used in that study will be relevant for this particular question, and *vice versa*. It may be sufficient, at this stage, to mention that the mere fact of a significant level of practice does not normally, on its own, give rise to a rule of Customary International Law. Thus, in assessing whether the fair and equitable standard represents Customary International Law, reference will also need to be made to the requisite *opinio juris* of States, whether the practice in question is of a widespread and uniform character, including the practice of States "specially affected". Decisions of arbitral tribunals in the cases noted Appendix II, and elsewhere, will need to be incorporated fully into this discussion.

(g) *Is Fair and Equitable Treatment a Principle of International Law?* There is a minority view that the fair and equitable treatment standard reflects a principle of law, which is applicable with respect to all States. The basis of this viewpoint is that all States can be expected to treat nationals and foreigners with fairness, because fairness must be inherent in the activities of States. This line of argument tends to suggest that fair and equitable treatment is a part of the rule of law. The validity of this contention will need to be assessed.

8. Another set of issues to be studied concern the content and scope of the fair and equitable treatment standard. In some respects, these issues overlap with issues concerning the meaning of the standard. The issues that may be considered here include:

(a) *What are the Elements of Fair and Equitable Treatment in Practice?* Arbitral tribunals have considered various elements of the standard, and have either accepted or rejected different suggestions as to what constitute the components of fair and equitable treatment. So, for example, there is some support for the view that a particular State action may fall short of the fair and equitable treatment standard if it (i) is discriminatory, (ii) amounts to a denial of justice, (iii) is undertaken in bad faith, (iv) falls short of the due process guarantees in the State concerned, (v) disrupts the legitimate expectations of the foreign investor, or (vi) falls short of standards of transparency. It has also been suggested that conduct on the part of a State may fall short of the fair and equitable treatment standard if it undermines the stability of business relationships in the host country, or if it goes against rules on which the foreign investor had relied in entering the host country.

(b) *In What Ways has Fair and Equitable Treatment Affected other Provisions of Bilateral Investment Treaties?* In some arbitral decisions, it has been accepted that the fair and equitable standard may apply to a set of circumstances even where another provision of a bilateral investment treaty is more specific and directly applicable. This has happened, for example, in the case of investment damage arising from armed conflict, where there was a directly applicable provision on armed conflict; this provision did not prevent the tribunal from applying the more general provision on fair and equitable standard. Thus, the study will need to examine whether there are limits to the circumstances in which the fair and equitable treatment standard may be applied. It may be possible that the standard is a "catch-all" provision meant to apply when other provisions do not provide a solution which coincides with the interests of justice, as interpreted by the arbitral tribunal or other decision-making body.

9. The concept of fair and equitable treatment also raises issues pertaining to the relationship between international law and domestic law. To begin with, when a host provides an assurance of fair and equitable treatment in its treaty relations, this may actually have only an indirect impact on the foreign investor intended to be the beneficiary of the treatment standard. In day-to-day activities, the foreign investor will be subject to

domestic law, and will, in the first instance, be inclined to invoke domestic law for the protection of investment interests. Thus, the question whether, and to what extent, the fair and equitable treatment standard has become a part of domestic legal systems will be of considerable practical significance to investors. This question will also be of importance to States whose nationals seek to derive protection pursuant to the fair and equitable standard; for, if countries that accept the standard do not, at the same time, implement it in their national laws, then the impact of the standard will be reduced in practice.

10. On a related point, the proposed study concerning fair and equitable treatment would also need to consider whether, and to what extent, this treatment standard is already an inherent part of national systems of law. As a starting-point, it may be fair to suggest that all legal systems seek to embrace fairness and equitable treatment for individuals. One question that arises, therefore, concerns the precise ways in which adherence to the fair and equitable standard in investment relations adds to, or clarifies, rights and duties in the domestic legal systems of host countries. Generally, the fair and equitable treatment standard, when interpreted by an international tribunal, provides the opportunity for an external body to assess whether State behaviour conforms with fairness and equity as a matter of international law. But, in practice, following the decision of the external tribunal, administrative bodies in national jurisdictions have to apply the meaning attributed to the fair and equitable standard in domestic law. The study will therefore need to consider ways in which domestic policy-makers and implementing bodies react to decisions of international tribunals on the meaning of fair and equitable treatment. This discussion should also prompt the question whether, and to what extent, there is a body of administrative law that may now be broadly applicable in the area of treatment for foreign investors.

11. Although the concept of fair and equitable treatment has developed largely in the context international investment law, there are significant links between this concept and other areas of law. So, for example, it is fair to suggest that when the foreign investor is perceived as an individual person, the treatment accorded to that person must respect universally recognized individual human rights, including the right to property. At the same time, the treatment accorded by foreign investors to individuals within host countries must also conform to standards of human rights. In light of such considerations, the study on fair and equitable treatment should not focus narrowly on the concept; rather, it should consider the implications of the concept for different stakeholders in the investment process, and should seek guidance on the meaning of the notion of fairness from diverse areas of international and national law.

III. Questions concerning the final product

12. It is difficult to say with any degree of certainty what type of document should emerge from the study proposed here. One possibility will be to put forward a statement concerning the meaning of the standard, outlining some of the implications that are likely to arise for States which provide an assurance of fair and equitable treatment in their treaty relations. It may also be possible to consider the respective meanings of the different forms which the fair and equitable treatment standard has taken in various treaties. On this approach, the study will help to clarify the law in one of the more contentious issues of modern practice.

13. It is also fair to suggest that the final form of the study on fair and equitable treatment may be influenced by the approach that the International Law Commission decides to take in respect of the final form of the products of its work on the topic of Most-Favoured-Nation Treatment and on the study of Customary International Law.

14. It may be possible that a set of guidelines for States could emerge from this study. The guidelines could indicate whether or not the fair and equitable standard reflects Customary International Law, and then set out the implications which are likely to follow for States if they formulate the fair and equitable treatment standard in one of a number of different ways.

15. It is suggested that, irrespective of the final form, the study will be of relevance to States. In the busy International Law office, lawyers may have neither the time nor the opportunity to study the jurisprudence concerning fair and equitable treatment. But, given the proliferation of investment treaties with this provision in place, the meaning to be given to the standard is significant for many States. Against this background, a clear statement of the law on this point, from an authoritative source, will be useful. Taken together with the work of the International Law Commission on the Most-Favoured-Nation provision, the study will help to enhance the Commission's work in the topical area of International Investment Law.

Appendix I
Preliminary bibliography

Abs, H., and Shawcross, H., "The Proposed Convention to Protect Private Foreign Investment: A Roundtable: Comment on the Draft Convention by the Authors", *Journal of Public Law*, Vol. 9, p. 115 (1960).

Achaval, Clara Picasso, "Tipping the Balance towards Investors?", *Journal of World Investment and Trade*, Vol. 9, No. 2, p. 147 (2008).

Afilalo, A., "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis", 17 *Georgetown International Environmental Law Review*, p. 51 (2004).

Aguilar Alvarez, G., and Montt, S., "Investments, Fair and Equitable Treatment and the Principle of Respect for the Integrity of the Law of the Host State: Toward a Jurisprudence of Modesty in Investment Treaty Arbitration", in Arsanjani, M.H., Cogan, J.K., *et al* (eds.) *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden, p. 579 (2010).

Ali, A.H., and Tallent, K., "The Effect of BITs on the International Body of Investment Law: the Significance of Fair and Equitable Treatment Provisions", *The Future of Investment Arbitration*, New York, NY: Oxford University Press, p. 199 (2009).

Alvarez-Jimenez, A., "Minimum Standard of Treatment of Aliens:, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the *Diallo* Case before the International Court of Justice", *Journal of World Investment and Trade*, Vol. 9, No. 1, p. 51 (2008).

Baltag, C., "International Investment Arbitration: Substantive Principles, Principles of International Investment Law and The Fair and Equitable Treatment Standard in International Foreign Investment Law", 79(1) *British Year Book of International Law*, p. 378 (2009).

Baxter, R.R., "Treaties and Custom" *Recueil des Cours* (The Hague Academy of International Law), Vol. 129, p. 24 (1970).

Bonnitcha, J., "The Problem of Moral Hazard and Its Implications for the Protection of 'Legitimate Expectations' Under the Fair and Equitable Treatment Standard", 3(1) *Investment Treaty News*, p. 6 (2011).

Boscariol, J.W., and Silva, O.E., "Canada-Peru Bilateral Investment Treaty is First Based on New Model", *International Law News*, p. 17 (Spring 2007).

Bray, D., and Reed, L., "Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?" *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Leiden: Nijhoff, p. 13 (2008).

Bronfman, M.K., "Fair and Equitable Treatment: an Evolving Standard", 10 *Max Planck Yearbook of United Nations Law*, p. 609 (2006).

Brower, C. N, "Fair and Equitable Treatment Under NAFTA's Investment Chapter", in 9 *American Society of International Law. Proceedings*, p. 96 (2002).

Choudhury, B.,"Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law", *Journal of World Investment & Trade*, Vol. 6, No. 2, p. 297 (2005).

Coe, J., "Fair and Equitable Treatment Under NAFTA's Investment Chapter", in 9 *American Society of International Law. Proceedings*, p. 18 (2002).

Costamagna, F., "Investors' Rights and State Regulatory Autonomy: the Role of the Legitimate Expectation Principle in the CMS v. Argentina Case", 2 *Transnational Dispute Management* (2006).

Deane, R.J.C., and Foy, P.G., (2001), "Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement", 16 *ICSID Review: Foreign Investments Law Journal*, p. 299 (2001).

Delaney, J., "'Expropriation' and 'Fair and Equitable Treatment' Standards in Recent ICSID Jurisprudence: Comment", *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years*, Baden-Baden: Nomos, p. 73 (2007).

DiMascio, N., and Pauwelyn, J., "Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" 102 *American Journal of International Law*, p. 48 (2008).

Dolzer, R., and Stevens, M., *Bilateral Investment Treaties* (Martinus Nijhoff Publishers) (1995).

Dolzer, R., "Fair and Equitable Treatment: A Key Standard in Investment Treaties", *International Law*, Vol. 39, p. 87 (2005).

Dolzer, R., "The Impact of International Investment Treaties on Domestic Administrative Law", 38 *New York University Journal of International Law and Policy*, p. 953 (2006).

Dolzer, R., and Schreuer, C., *Principles of International Investment Law* (Oxford University Press) (2008).

Dolzer, R., and von Walter, A., "Fair and Equitable Treatment: Lines of Jurisprudence on Customary Law", in 2 *Investment Treaty Law: Current Issues*, London: British Institute of International and Comparative Law, p. 99 (2007).

Douaire de Bondy, C., "Fair and Equitable Treatment, Arbitral Jurisprudence and the Implications of State Treaty Practice", 2 *Investment Treaty Arbitration and International Law*, Huntingtion, NY: JurisNet, p. 233 (2009).

Dumberry, P., "The Quest to Define "Fair and Equitable Treatment" for Investors under International Law: The Case of the NAFTA Chapter II Pope & Talbot Awards", *Journal of World Investment*, Vol. 3, No. 4, p. 657 (2002).

Falsafi, A., "The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard", 30 *Suffolk Transnational Law Review*, p. 317 (2007).

Fatouros, A.A., *Government Guarantees to Foreign Investors* (New York, Columbia University Press) (1962).

Fernandez de la Cuesta Gonzalez, I., "Fair and Equitable Treatment: Evolution or Revolution?" 2 *Investment Treaty Arbitration and International Law*, Huntington, NY: JurisNet, p. 219 (2009).

Fietta, S., "Expropriation and the 'Fair and Equitable Treatment' Standard", 2 *Investment Treaty Law: Current Issues*, London: British Institute of International and Comparative Law, p. 183 (2007).

Fietta, S., "Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors' 'Expectations' in International Investment Arbitration", *Journal of International Arbitration*, Vol. 23, No. 5, p. 375 (2006).

Franck, S.D., "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 *Fordham Law Review*, p. 1521 (2005).

Gagne, G., and Morin, J., "The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT", *Journal of International Economic Law*, Vol. 9, No. 2, p. 357 (2006).

Gallus, N., "National Grid P.L.C. v. Argentine Republic: Arbitral Award on Fair and Equitable Treatment of Investments Under a Bilateral Investment Treaty – Fair and Equitable Treatment – Protection and Constant Security – Renunciation of Legal Remedies", 103 *American Journal of International Law*, p. 722 (2009).

Gazzini, Tarcisio, "General Principles of Law in the Field of Foreign Investment", *Journal of World Investment and Trade*, Vol. 10, No. 1, p. 103 (2009).

Haeri, H., "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law", *Kluwer Law International*, Vol. 27, No. 1, p. 27 (2011).

Hamrock, K.J., "The ELSI Case: Toward an International Definition of 'Arbitrary' Conduct", 27 *Texas International Law Journal*, p. 837 (1992).

Hindelang, S., "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – The Question of Whether BITs Influence Customary International Law Revisited", 5 *Journal of World Investment and Trade*, p. 789 (2004).

Hober, K., "'Fair and Equitable Treatment': Determining Compensation: Comment", *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years*, Baden-Baden: Nomos, p. 79 (2007).

International Centre for Settlement of Investment Disputes, *Foreign Investment Laws of the World* (Dobbs Ferry, Oceana)(1972 --).

Jimenez de Arechaga, E., "International Responsibility", in Sorensen, M., (ed.), *Manual of Public International Law* (New York, Macmillan), p. 531 (1968).

Kalicki, J., and Medeiros, S., "Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law?" 22(1) *ICSID Review: Foreign Investment Law Journal*, p. 24 (2007).

Kantor, M., "Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach Towards Regulatory Expropriation", *The Law and Practice of International Courts and Tribunals*, Vol, 5, No. 2, p. 231 (2006).

Kill, Theodore, "Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations", *Michigan Law Review*, Vol. 106, p. 105 (2008),

Kingsbury, B., and Schill, S., "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", in Van Den Berg, A., (ed.), *International Council for Commercial Arbitration, 50 Years of the New York Convention*, p. 5 (2009).

Kinnear, M., "The Continuing Development of the Fair and Equitable Treatment Standard", 3 *Investment Treaty Law: Current Issues*, British Institute of International and Comparative Law, London, p. 209 (2009).

Kirkman, C.C., "Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105", 34 *Law and Policy of International Business*, p. 343 (2002).

Klager, R., *Fair and Equitable Treatment in International Investment Law*, New York: Cambridge University Press, Cambridge Studies in International and Comparative Law (2011).

Klager, R., "Chapter 11: 'Fair and Equitable Treatment' and Sustainable Development", in Cordonier Segger, M.C., Gehring, M.W., *et al* (eds), *Sustainable Development in World Investment Law*, Global Trade Law Series, p. 241 (2011).

Klager, R., "Fair and Equitable Treatment: a Look at the Theoretical Underpinnings of Legitimacy and Fairness", *The Journal of World Investment & Trade*, Vol. 11, No. 3, p. 435 (2010).

Kreindler, R.H., (2006), "Fair and Equitable Treatment – A Comparative International Law Approach", *Transnational Dispute Management*, Vol. 3, No. 3, p. 10 (2006).

Laing, E.A., "Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law", 14 *Wisconsin International Law Journal*, p. 246 (1996).

Levavi, A., and Licht, A.N."BITs and Pieces of Property", 36 *Yale Journal of International Law*, p. 115 (2011).

Lowenfeld, Andreas F., *International Economic Law* (Oxford University Press) (2003).

MacDonald, E., "BITs, Fair and Equitable Treatment and the Cross-Pollination of GAL", *Institute for International Law and Justice*, New York University School of Law, Global Administrative Law, available from http://globaladminlaw. blogspot.com/2010/03/bits-fair-and-equitable-treatment-and.html (2010).

Mann, F.A., "British Treaties for the Promotion and Protection of Investments", 52 *British Yearbook of International Law*, p. 241 (1981).

Marshall, F., "Fair and Equitable Treatment in International Investment Agreements", *Issues in International Investment Law*, Background Papers for the Developing Country Investment Negotiators' Forum, International Institute for Sustainable Development (2007).

Mohamed, K., "Treatment of Foreign Investment in Bilateral Investment Treaties", *ICSID Review – Foreign Investment Law Journal*, Vol. 7, p. 339 (1992).

Mayeda, G., "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties", *Journal of World Trade: Law, Economics, Public Policy*, Vol. 41, No. 2, p. 273 (2007).

Muchlinski, P., "'Caveat Investor'?: the Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard", 2 *Investment Treaty Law: Current Issues*, p. 205 (2007).

Newcombe, A., and Paradell, L., *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law) (2009).

Nwogugu, E.I., *The Legal Problems of Foreign Investment in Developing Countries* (Manchester University Press) (1965).

Organisation for Economic Cooperation and Development, "Fair and Equitable Treatment and its Relation to the Minimum Standard of International Customary Law", 4 *International Economic Law*, New York, NY: Routledge, p. 10 (2011).

Orakhelashvili, A., "The Normative Basis of 'Fair and Equitable Treatment': General International Law on Foreign Investment", in 46 (1) *Archiv des Volkerrechts*, p. 74 (2008).

Paparinskis, M., *Minimum Standard and Fair and Equitable Treatment*, Oxford University Press (2011).

Paradell, L., "The BIT Experience of the Fair and Equitable Treatment Standard", 2 *Investment Treaty Law: Current Issues*, p. 117 (2007).

Parra, A.R., "Principles Governing Foreign Investment as Reflected in National Investment Codes", *ICSID Review – Foreign Investment Law Journal*, Vol. 7, p. 428 (1992).

Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press (2005).

Peterson, L.E., "Co-arbitrators in Total v. Argentina case Take Widely Divergent Views of Argentina's Fair and Equitable Treatment Obligation Under Investment Treaty", *Investment Arbitration Reporter*, available from http://www.iareporter.com/articles/20110331_2, (2011).

Picherack, J. Roman, "The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?", *The Journal of World Investment and Trade*, vol. 9, No. 4, p. 255, (2008).

Pinto-Leon, I., "Fair and Equitable Treatment Under International Law: Analyzing the Interpretation of the NAFTA Article 1105.1 by NAFTA Chapter 11 Tribunals", in *Currents International Trade Law Journal*, p. 3 (2006).

Porterfield, Matthew C., "An International Common Law of Investor Rights?" *University of Pennsylvania Journal of International Economic Law*, Vol. 27, No. 1, p. 79 (2006).

Roberts, A., "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", 104 *American Journal of International Law*, p. 179 (2010).

Ryan, C.M., "Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law", 29 *University of Pennsylvania Journal of International Law*, p. 725 (2008).

Sacerdoti, G., "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours* (The Hague Academy of International Law). Vol. 269, p. 251 (1997).

Salacuse, J.W., *The Law of Investment Treaties* (Oxford University Press) (2010).

Salacuse, J.W., "The Emerging Global Regime for Investment", 51 *Harvard International Law Journal*, p. 427 (2010).

Salacuse, J.W., and Sullivan, N.P., "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46 *Harvard International Law Journal*, p. 67 (2005).

Schill, S.W., "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law", in Institute for International Law and Justice, New York University School of Law, *International Law and Justice Working Papers* (2006).

Schill, S.W., "The Fair and Equitable Standard in the International Law of Foreign Investment", *European Journal of International Law*, Vol. 20, No. 1, p. 229 (2009).

Schill, S.W., "'Fair and Equitable Treatment' as an Embodiment of the Rule of Law", *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years*, Baden-Baden: Nomos, p. 31 (2007).

Schill, S.W., "Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed", *Transnational Dispute Management*, Vol. 3, No. 2 (2006).

Schneiderman, D., "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes", *Northwestern Journal of International Law and Business*, Vol. 30, p. 383 (2010).

Schneiderman, D., "Investment Rules and the Rule of Law", *Constellations*, Vol. 8, No. 4, p. 521 (2001).

Schønberg, S., *Legitimate Expectations in Administrative Law*, Oxford University Press (2000).

Schreuer, C., "Fair and Equitable Treatment (FET): Interactions with Other Standards", *Transnational Dispute Management*, Vol. 4, Issue 5 (2007).

Schreuer, C., "Selected Standards of Treatment Available under the Energy Charter Treaty", *Investment Protection and the Energy Charter Treaty*, p. 63 (2008).

Schreuer, C., "Fair and Equitable Treatment in Arbitral Practice", *The Journal of World Investment & Trade*, Vol. 6, No. 3, p. 357 (2005).

Schreuer, C., (2005) "Fair and Equitable Treatment", 5 *Transnational Dispute Management* (2005).

Song, N., "Between Scylla and Charybdis: Can a Plea of Necessity Offer Safe Passage to States in Responding to an Economic Crisis Without Incurring Liability to Foreign Investors?" 19 *American Review of International Arbitration*, p. 235 (2008).

Sornarajah, M., "The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?" 2 *Investment Treaty Law: Current Issues*, p. 167 (2007).

Sornarajah, M., *The International Law of Foreign Investment*, Cambridge University Press (2010).

Thomas, J.C., "Fair and Equitable Treatment Under NAFTA's Investment Chapter", Remarks at the Meeting of the American Society of International Law (Mar. 13–16, 2002), *American Society of International Law, Proceedings of the 96th Annual Meeting*, p. 14 (2002).

Thomas, J.C., "Reflections on Art. 1105 NAFTA: History, State Practice and the Influence of Commentators", 17 *ICSID Review – Foreign Investment Law Journal*, pp. 21–51 (2002).

Tuck, A.P., "The 'Fair and Equitable Treatment' Standard Pursuant to the Investment Provisions of the U.S Free Trade Agreements with Peru, Columbia and Panama", 16 *Law and Business Review of the Americas*, p. 385 (2010).

Tudor, I., "The Fair and Equitable Treatment Standard in the International Law of Foreign Investment" (Oxford University Press) (2008).

Tudor, I., "Fair and Equitable Treatment in Investment Disputes under ICSID", in Dupuy, P-M., Francioni, F., and Petersmann, E.U., (eds) *Human Rights in International Investment Law and Arbitration*, New York: Oxford University Press (2009).

United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007).

UNCTAD, *Admission and Establishment*, UNCTAD Series on Issues in International Investment Agreements (1999).

UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements (1999).

UNCTAD, *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements (1999).

UNCTAD, *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II (2011).

UNCTAD, *Trends in International Investment Agreements: An Overview*, UNCTAD Series on Issues in International Investment Agreements (1999).

van Aaken, A., "International Investment Law between Commitment and Flexibility: A Contract Theory Analysis", *Journal of International Economic Law*, p. 1 (2009).

Vandevelde, K.J., *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press) (2010).

Vandevelde, K.J., (2010), "A Unified Theory of Fair and Equitable Treatment", 43(1) *New York University Journal of International Law and Politics*, p. 43 (2010).

Vandevelde, K.J., "The Bilateral Investment Treaty Program of the United States", *Cornell International Law Journal*, Vol. 21, p. 201 (1988).

Vasciannie, S., "Fair and Equitable Treatment in International Investment Law", 70 *British Yearbook of International Law*, p. 99 (2000).

Vicuna, F.O., "'Fair and Equitable Treatment' and Sustainable Development", in Cordonier Segger, M.C., Gehring, M.W., *et al* (eds), *Sustainable Development in World Investment Law*, Global Trade Law Series, Volume 30 (Kluwer Law International), p. 237 (2011).

Vicuna, F.O., "Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society", 5 *International Law Forum du Droit International*, p. 194 (2003).

Walker, H., "Modern Treaties of Friendship, Commerce and Navigation", *Minnesota Law Review*, Vol. 42, p. 805 (1957–58).

Wallace, D., Jr., "Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico", *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London: Cameron May, p. 669 (2005).

Weiler, T., "NAFTA Article 1105 and the Principles of International Economic Law", 42 *Columbia Journal of Transnational Law*, p. 35 (2003).

Weiniger, M., "The Standard of Compensation for Violation of the Fair and Equitable Standard", 2 *Investment Treaty Law: Current Issues*, p. 197 (2007).

Westcott, T.J., "Recent Practice on Fair and Equitable Treatment", *The Journal of World Investment & Trade*, Vol. 8, No. 3, p. 409 (2007).

Whitslitt, E., and Vis-Dunbar, D. "*Glamis Gold Ltd. v. United States of America*: Tribunal sets a high bar for establishing breach of "Fair and Equitable Treatment" under NAFTA", *Investment Treaty News* (2009).

World Bank Group, "Progress Report on the 'Legal Framework' for the Treatment of Foreign Investment", 7 *ICSID Review – Foreign Investment Law Journal*, p. 307 (1992).

Wyllie, C.A., "A Comparative Analysis of Non-Discrimination in Multilateral Agreements; North American Free Trade Agreement (NAFTA), Energy Charter Treaty (ECT), and General Agreement on Tariffs and Trade (GATT)", 18 *Willamette Journal of International Law and Dispute Resolution*, p. 64 (2010).

Wythes, A., "Investor-State Arbitration: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?" *Leiden Journal of International Law*, Vol. 23, No. 1, p. 241 (2010).

Yackee, J.W., "Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality", 32 *Fordham International Law Journal*, pg. 1550 (2009).

Yannaca-Small, C., "Fair and Equitable Treatment Standard in International Investment Law" 2 (OECD Directorate for Fin. & Enter. Affairs, Working Paper No. 2004/3, 2004), http://www.oecd.org/dataoecd/22/53/33776498.pdf (2004).

Yannaca-Small, K., "Fair and Equitable Treatment Standard: Recent Developments", in Reinisch, A. (ed.), *Standards of Investment Protection* (Oxford University Press), p. 111 (2008).

Yannaca-Small, K., (2010), "Fair and Equitable Treatment Standard", *Arbitration Under International Investment Agreements: a Guide to the Key Issues*, Oxford University Press, New York, NY, p. 385 (2010).

Zoellner, C.S., "Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law", 27 *Michigan Journal of International Law*, p. 579 (2006).

Appendix II
Table of cases

Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, 30 *International Legal Materials* 580 (1991).

ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Final Award of Jan. 9, 2003.

Alex Genin, Eastern Credit Limited, Inc. and A. S. Baltoil v. Republic of Estonia, ICSID Case No ARB/99/2, Award of June 25, 2001.

AMT v. Zaire, ICSID Case No. ARB 93/1, Award of 21 Feb., 1997.

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006.

CME (Netherlands) v. The Czech Republic, UNCITRAL Partial Award of September 13, 2001.

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award of May 12, 2005.

Compañia de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux (Vivendi) v. Argentina, ICSID Case No. ARB/97/3, Award of Nov. 21, 2000.

Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Sentence Arbitrale of Dec. 22, 2003.

DF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Final Award of Jan. 9, 2003.

Electtronica Sicula Spa (ELSI) (United States of America v. Italy), International Court of Justice, Judgment of 10 July 1989, www.icj-cij.org.

Eureko B.V. v. Republic of Poland, Partial Award of Aug. 19, 2005.

GAMI Investments, Inc. v. The United Mexican States, UNCITRAL, Final Award of Nov. 15, 2004.

International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award of Jan. 26, 2006.

Loewen Group, Inc. and Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, Final Award of June 26, 2003.

Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award of Aug. 30, 2000.

Middle East Cement Shipping and Handling Co S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award of April 12, 2002.

Mondev International Ltd. v. The United States of America, ICSID Case No. ARB(AF)/99/2, Award of Oct. 11, 2002.

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of May 25, 2004.

Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Final Award of Oct. 12, 2005.

Occidental Exploration and Production Company v. *The Republic of Ecuador*, LCIA Case No. UN3467, Final Award of July 1, 2004.

Pope & Talbot, UNCITRAL, Award in Respect of Damages of May 31, 2002.

Robert Azinian, Kenneth Davitian, & Ellen Baca v. *The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Final Award of Nov. 1, 1999.

Ronald S. Lauder v. *The Czech Republic*, UNCITRAL, Award of Sept. 2, 2001.

Saluka Investments BV v. *The Czech Republic*, UNCITRAL, Partial Award of Mar. 17, 2006.

S.D. Myers, Inc. v. *Government of Canada*, UNCITRAL, Partial Award of Nov. 13, 2000.

Tecnicas Medioambientales Tecmed S.A. v. *The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003.

Waste Management, Inc. v. *The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004.

Wena Hotels Ltd. v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 Dec. 2000.

Annex E
Protection of the environment in relation to armed conflicts (Ms. Marie G. Jacobsson)

I. Introduction

1. It has long been recognised that the effect on the environment during and after an armed conflict may pose a serious threat to the livelihoods and even existence of individual human beings and communities. The effect on the environment differs from other consequences of an armed conflict since it may be long-term and irreparable. It may remain long after the conflict and prevent an effective rebuilding of the society, destroy pristine areas or disrupt important ecosystems.

2. The protection of the environment in armed conflicts has been primarily viewed through the lens of the laws of warfare, including international humanitarian law. However, this perspective is too narrow as modern international law recognises that the international law applicable during an armed conflict may be wider than the laws of warfare. This is also recognised by the International Law Commission (ILC) in its recent work on Effect of Armed Conflicts on Treaties. This work takes as its starting point (Article 3) the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. The combined implication of Article 7 and the Annex of treaties is that, because of their subject matter, several categories of treaties relevant to the protection of the environment may continue in operation during periods of armed conflict.[1]

II. Background[2]

3. The need to protect the environment in times of armed conflict is not a 21st Century idea, or even a 20th Century idea. On the contrary, it is possible to trace legal rules relating to the natural environment and its resources back to ancient time. Such rules were closely connected with the need of individuals to have access to natural resources essential for their survival, such as clean water. Given the conditions under which war then was conducted, as well as the means and methods used, there was limited risk of extensive environmental destruction.

4. This changed during the 20th Century when technological development placed the environment at a greater risk of being permanently destroyed through destruction caused by nuclear weapons or other weapons of mass destruction, but also through destruction caused by conventional means and methods of warfare. The technological development went hand in hand with a rising awareness of the need to protect the environment for the benefit of existing and future generations.

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[1] Article 7 (Continued operation of treaties resulting from their subject-matter) and the indicative list of treaties annexed. The list includes treaties relating to the international protection of the environment, treaties relating to international watercourses and related installations and facilities, treaties relating to aquifers and related installations and facilities, treaties relating to human rights and treaties on international criminal justice, and, for obvious reasons: treaties on the law of armed conflict, including treaties on international humanitarian law.

[2] This section is by necessity brief and incomplete. It serves only as a frame of historical reference.

5. It is possible to identify three periods since the adoption of the UN Charter when the protection of the environment in relation to armed conflict has been addressed with the aim of enhancing the legal protection. The first phase started in the early 1960s, the second in the early 1990s and the third in the 2010s.

6. The **first phase,** begun in the 1960s, was spurred, on the one hand, by the means and methods of warfare during the Vietnam War, and, on the other hand, by the rising awareness of the need to protect the environment in more general terms (the birth of the international environmental law). The Stockholm Declaration on the Protection of the Environment (a political declaration in 1972) signals an attempt to expand the "Trail Smelter" principle beyond a bilateral context (Principle 21). The sensitive issue of the use of nuclear weapons was addressed, in vague terms, in Principle 26. Although no decisive legal conclusions can be drawn from the Stockholm Declaration, it gave a signal of what was the concern and what was to come in the Rio Declaration (1992), see below.

7. A few years later, specific provisions addressing the protection of the environment were included in international humanitarian law treaties. It is worth quoting two articles, Article 35 and Article 55 of the First Additional Protocol (1977) to the 1949 Geneva Conventions, not least because they partly seem to contradict each other.

Article 35, para.3 reads:

> *"It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."*[3]

Article 55 reads:

> *"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.*
>
> *2. Attacks against the natural environment by way of reprisals are prohibited."*

8. In addition, the ENMOD treaty, which aims exclusively to protect the environment, was adopted.[4] The standard-setting Article 1, para. 1 reads:

> *"Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."*

9. During the 1980s, the Iran-Iraq war drew the attention of States and organizations to the need for enhanced protection of the environment during armed conflicts. This is

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[3] This is repeated in the Preamble of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the so-called CCW (1980).

[4] Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976, ENMOD. The Convention provides for review conferences to be held at least every five years, but thus far, only two review conferences have been held, in 1984 and in 1992.

evidenced e.g. by the request from the Commission of the European Communities for a report on the matter.[5]

10. The **second phase** started with the Iraq-Kuwait war in 1990. The burning of oil wells and other environmentally disastrous effects of the war awoke the international community to the effect of modern warfare on the environment. In addition, the United Nations Compensation Commission (UNCC) was established and entrusted with cases relating to loss or damage of the environment and the depletion of natural resources.[6] In its reports, the Commission discusses each claim for compensation separately and gives reasons for their acceptance, denial or adjustment. This provides a substantial amount of case law although the Commission relies on the criteria provided by the United Nations Security Council and Governing Council and not international law *per se*. It is noteworthy that the Commission awarded some compensation for all these claims, including for indirect damage to wetlands from water consumption by refugees.

11. In parallel, the item of protection of the environment was placed on the agenda of the United Nations: first under the heading, *Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation*; and subsequently as *Protection of the environment in times of armed conflict*.[7] The Secretary General submitted his first report on the protection of the environment in times of armed conflict in 1992 and a second report in 1993. In essence, these reports were a reproduction of information received from the ICRC. The report of 1993 suggested what issues could be examined by the Sixth Committee.[8] The issues included the question of *"[a]pplicability in armed conflict of international environmental law; general clarification and action on case of revision of treaties"*.[9] At that time, the item had lost its place as an independent agenda item. Instead, it was dealt with under the item United Nations Decade of International Law.[10]

12. The ICRC was mandated by the General Assembly to work with the issue. As a consequence, expert meetings were held, and the issue was also on the agenda of the International Red Cross and Red Crescent Conferences. One result was the *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict*, annexed to the Report submitted by the ICRC to the forty-eighth session of the United Nations General Assembly. Due to lack of political support for any modification of the law of armed conflict as reflected in existing treaty provisions, annexing the Guidelines to a resolution and inviting States to disseminate them, was as far as it was possible to go at the time.[11]

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[5] Bothe, Michael, Antonio Cassese, Frity Kalshoven, Alexandre Kiss, Jean Salmon and K.R. Simmonds. "Protection of the Environment in Times of Armed Conflict", *Report to the Commission of the European Communities*, SJ/110/85 (1985).

[6] The United Nations Compensation Commission (UNCC) was established under UNSC Resolution 687 (3 April 1991). The mandate of the UNCC is more closely related to the old so-called Hague rules (1907), which contain regulations on compensation for violations of the laws of war, than to the Geneva Conventions and their First Additional Protocol.

[7] It was originally Jordan in 1991 that proposed to include the item on the agenda, see A/46/141, and the proposal was accepted. In 1992, the General Assembly decided to include the topic "*Protection of the environment in times of armed conflict*" on its agenda and to allocate it to the Sixth Committee.

[8] A/48/269.

[9] A/48/269, para. 110.

[10] A/RES/47/37.

[11] A/RES/49/50, op. para 11. The lack of a broad support for bringing the issue forward was further evidenced by the lack of development relating to the ENMOD treaty.

13. It should be recalled that the United Nations Conference on Environment and Development took place in 1992. The conference adopted the Rio Declaration, which clearly stipulates in Principle 24 and Principle 23 respectively that:

> *"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."*

and

> *"The environment and natural resources of people under oppression, domination and occupation shall be protected."*

14. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994) repeatedly addresses the protection of the environment, for example by including damage to or the destruction of the natural environment or objects that are not in themselves military objectives as collateral casualties or collateral damage. The legal aspect of protecting the environment is particularly relevant in naval warfare since belligerents and third parties may have legitimate and competing claims to use an area outside the sovereignty of a State.[12]

15. The armed conflicts in the former Yugoslavia also bore evidence of the disastrous effects on the environment of both legal and illegal means and methods of warfare. At the same time, pressing concern from the international civil community forced states to address one particular aspect of IHL of direct relevance to the protection of the environment: the use of anti-personnel landmines. It is obvious that the lack of implementation of the existing provisions in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) brought about devastation, not only to those individual civilians that were maimed by the landmines, but also to their effective and secure use of land after the war was over. The examples of Balkan, Cambodia and Mozambique are self-explanatory. In addition to the lack of implementation, a major concern was the simple fact that the existing convention was not applicable in non-international armed conflicts. As a result, the Convention and its Second Protocol on Landmines were revised. However, this was not enough for those states and individual groups that wanted a more extensive ban. In a parallel track, the Ottawa Convention on a total ban on the use of anti-personnel landmines was negotiated and adopted.

16. The legally interesting aspect of this development is that the initial reluctance on the part of important militarily powerful states to modify the laws of armed conflict did not prevent the parallel development of a regime for the protection of the civilian population and its base of subsistence.

17. The **third phase** started in the early 2010s. It is difficult to connect the beginning of this phase with any particular war, but rather stems from a growing awareness of the need to protect the environment as such. Indeed, several wars such as those in Kosovo, Iraq, and Lebanon all bore evidence that war-torn societies pay a high environmental price. At the same time, international courts and tribunals addressed the issue of the protection of the environment in court practice. The negative effects on the environment were also raised by fact-finding missions. Starting with the legal cases in the 1990s, it was no longer sufficient to seek for legal answers in the realm of the laws of warfare. The development of environmental law and international criminal law could not be neglected, and it is worth

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[12] Manual on International Law Applicable to Air and Missile Warfare (2009) also contain specific rules regarding the protection of the natural environment, see Rules 88–89.

noticing that the International Criminal Court has jurisdiction over crimes that cause certain damage to the environment.[13]

III. Work done by other bodies

18. As mentioned above, the ICRC summoned expert meetings and presented important reports during the 1990s. Those include *Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict* (1994). The perspective of the ICRC is, for obvious reasons, that of international humanitarian law. This in essence poses the question: to what extent does existing international humanitarian law contain principles, rules or provisions that aim to protect the environment during an armed conflict. It is often noted that the environment needs to be protected in order to achieve the goal of protecting civilians and their livelihoods. But it is likewise pointed out that the environment as such needs protection. The underlying assumption is that the environment is civil in nature. This is evidenced by the ICRC's multi-volume explanation of customary international humanitarian law, published in 2005. Three of the rules identified by the ICRC as customary law, namely Rules 43–45, relate particularly to natural resources and environmental protection during armed conflicts. Rule 44 reads:

> *"Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions."*

19. In 2010, the ICRC raised the issue on the current state of international humanitarian law. In its presentation on the topic *Strengthening Legal Protection for Victims of Armed Conflict*, the ICRC draws the conclusion that humanitarian law needs to be reinforced in order to protect the natural environment.[14] The ICRC apparently concludes that the extensive development of international environmental law in recent decades is not matched by a similar development in international humanitarian law. The clarification and development of international humanitarian law for the protection of the environment has lagged behind. It is a noteworthy conclusion since the ICRC predominantly expresses concern over the lack of the implementation of IHL provisions.

20. The **International Law Association (ILA)** has issued several reports of relevance to the topic. Of direct relevance is the 2004 report from the Committee on Water Resource Law. Chapter X, Articles 50–55, is entirely devoted to Protection of Waters and Water Installations During War or Armed Conflict. Another report is the 2010 Report on Reparations for Victims of Armed Conflict. It is also worth mentioning the 2006 report of the ILA's Committee on Transnational Enforcement of Environmental Law. While it does not specifically discuss the protection of the environment in the context of armed conflict, it does propose rules relating to the standing of individuals to bring claims for the destruction of the environment and other access to justice issues.[15]

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[13] Article 8 of the Rome Statute (1998).

[14] http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm.

[15] Its main focus seems to be domestic remedies for environmental claims, but the report also discusses the rejected Draft Article 7, which would have allowed judicial proceedings against a government for breaches of international environmental law.

21. The **International Union for the Conservation of Nature (IUCN)** has formed a Specialist Group on Armed Conflict and the Environment which is undertaking two related activities: exploring current questions of the law of armed conflict as it relates to the protection of the environment and assessing experiences in post-conflict management of natural resources and the environment. A survey on the status of international law protecting the environment during armed conflict, including opportunities for strengthening the law and its implementation is apparently under way.

22. The **United Nations Environmental Programme (UNEP)** and the **Environmental Law Institute (ELI)**, together with leading specialists in international law and the **ICRC**, have conducted a legal assessment of the protection of the environment during armed conflicts which produced the 2009 report *Protecting the Environment During Armed Conflict – An Inventory and Analysis of International Law*. The report examines four main bodies of international law that provide protection for the environment during armed conflicts: international humanitarian law, international criminal law, international environmental law, and human rights law. The report culminates with a number of key findings explaining why the environment still lacks effective protection in times of armed conflict. It also makes recommendations for how these challenges can be addressed and the legal framework strengthened.

IV. The UNEP proposal to the ILC

23. It was out of concern "that the environment continues to be the silent victim of modern warfare" that the UNEP and the Environmental Law Institute "*undertook a joint assessment of the state of the existing legal framework protecting natural resources and the environment during armed conflict*" in 2009.[16] The assessment is the result of an international expert meeting held by UNEP and the ICRC in March 2009. Based on ten key findings, the Report provides for twelve recommendations, among them that the ILC, as "*the leading body with expertise in international law*", should "*examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded*".[17]

The Report suggests that the following issues be addressed.

(a) *An inventory of the legal provisions and the identification of gaps and barriers to enforcement;*

(b) *An exploration of options for clarifying and codifying this body of law;*

(c) *The definition of key terms such as "widespread", "long-term" and "severe";*

(d) *The consideration of the applicability of multilateral environmental agreements during armed conflicts as part of its ongoing analysis of the "effect of armed conflict on treaties";*

(e) *Extending protection of the environment and natural resources in the context of non-international armed conflict; and*

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[16] UNEP Report, 2009, p. 9.

[17] UNEP Report, 2009, Recommendation 3, p. 53.

(f) Considering how the detailed standards, practice and case law of international environmental law could be used to clarify gaps and ambiguities in international humanitarian law.[18]

V. Major issues raised by the topic

24. The proposal submitted by the UNEP Report raises the issue if the suggested topic would be a suitable topic for the Commission.

25. The ILC should continue to keep an open mind with respect to proposals submitted to it. Proposals submitted by the General Assembly, other bodies within the United Nations system and States, carry a special weight. It should be noted that the ILC has tried to encourage other United Nations bodies to submit proposals to the Commission at least since 1996.[19] Hence, the suggestion by UNEP deserves serious consideration, particularly since it *prima facie* appears a well-founded proposal.

26. So, what are the major issues raised by the topic?

27. The applicable law in relation to armed conflict clearly extends beyond the realm of the laws of warfare. It is not sufficient to refer to international humanitarian law as *lex specialis* in the hope of finding a solution to a specific legal problem. Also other areas of international law may be applicable, such as human rights. The International Court of Justice has clearly recognised this.

> *"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law."*[20]

28. The underlying assumption of the Court's reasoning is also recognised by the ILC, *inter alia* in its work on fragmentation[21] and in its recent work on Effect of Armed Conflicts on Treaties. This work takes as its starting point (Article 3) the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.[22]

29. Even if one were to assume that only the law of armed conflict is applicable during an armed conflict, that law is also applicable before and after the an armed conflict since it contains rules relating to measures taken before and after an armed conflict. Therefore, it is

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[18] UNEP, *Protecting the Environment During Armed Conflict – An Inventory and Analysis of International Law* (2009), p. 53.

[19] *Yearbook of the International Law Commission, 1996*, Volume II, Part Two, para. 148. and para. 165.

[20] Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory, ICJ, Advisory Opinion, 2004, p. 178, para. 106.

[21] Fragmentation of international law: Difficulties arising from diversification and expansion of international law. Report of the Study Group of the International Law Commission, A/CN.4/L.682.

[22] *Supra*, p. 1.

obvious that applicable rules of the *lex specialis* (the law of armed conflict) co-exist with other rules of international law.

30. It seems as if no State or judicial body questions the parallel application of different branches of international law, such as human rights law, refugee law and environmental law. It also seems as if States and judicial bodies are uncertain as to the precise extension and balance of those areas of the law. At the same time, there is an expressed need to analyse and come to conclusions with respect to this problem. This is a new development in the application of international law, and States are faced with concrete problems of urgent needs. The case of the environmental effects of the war in the Democratic Republic of the Congo provides an important example of how internal wars force the population to flee and resettle – often in or near sensitive forest ecosystems. In such a situation, does the 1972 Convention for the Protection of the World Cultural and Natural Heritage continue to apply?

VI. Proposal

31. Beginning almost two decades ago, several legal and semi-legal bodies have addressed the issue of the protection of the environment in times of armed conflict. This is a clear indication both of the existence of a legal problem and the need to address the matter.

It is therefore proposed that the ILC examine the topic in its long-term programme of work. The aim should be to:

- Identify the extent of the legal problem
- Identify any new developments in case law or in customary law
- Clarify the applicability of and the relationship between International Humanitarian Law, International Criminal Law, International Environmental Law and Human Rights Law
- Further develop the findings of the ILC's work on the Effect of Armed Conflict on Treaties, particularly on matters concerning the continued application of treaties relating to the protection of the environment and human rights
- Clarify the relation between existing treaty law and new legal developments (including legal reasoning)
- Suggest what needs to be done to achieve a uniform and coherent system (so as to prevent the risk of fragmentation)
- Envisage the formulation of applicable rules and formulate principles of general international law of relevance for the topic

32. The topic would also fit well into the ambitions express by the Commission in 1997, namely that the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[23]

33. The final outcome could be either a Draft Framework Convention or a Statement of Principles and Rules on the Protection of the Environment in Times of Armed Conflict.

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[23] *Yearbook of the International Law Commission, 1997*, vol. II (Part Two), para. 238; and *ibid., 1998*, vol. II (Part Two), para. 553.

34. The time frame envisaged should be five years. The first three years should be devoted to indentifying existing rules and conflicts of rules. The fourth and fifth years should be devoted to operative conclusions and finalization of the outcome document in whatever form the ILC may deem most appropriate.

Appendix I
Examples of relevant treaties and non-treaty practise

1. The laws of warfare and international criminal law

(g) Treaties directly addressing the protection of the environment in relation to armed conflict

(i) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) (1976)

(ii) Additional Protocol I to the 1949 Geneva Conventions (1977), especially Article 35(3) and Article 55(1)

(iii) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) (1980), and its Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980)

(iv) The Rome Statute of the International Criminal Court (1998), especially Articles 6, 7 and 8

(h) International humanitarian law and disarmament treaties that indirectly protect the environment in relation to armed conflict

(i) Convention Respecting the Laws and Customs of War on Land (Hague Convention IV) (1907)

(ii) Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V) (1907)

(iii) Convention Concerning the Right and Duties of Neutral Powers in Naval War (Hague Convention XIII) (1907)

(iv) The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925)

(v) Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (1949)

(vi) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), and its Protocol I (1954) and Protocol II (1999)

(vii) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (1963)

(viii) Treaty on the Non-Proliferation of Nuclear Weapons (1968)

(ix) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) (1972)

(x) Additional Protocol II to the 1949 Geneva Conventions (1977)

(xi) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) (1993)

(xii) Comprehensive Nuclear Test Ban Treaty (1996)

(xiii) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) (1997)

(xiv) Convention on Cluster Munitions (2008)

(xv) Examples of special regimes:

(1) The Spitzbergen Treaty (1920)

(2) The Åland Treaty (1921)

(3) The Antarctic Treaty (1959)

(4) Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (1967)

(5) The South Pacific Nuclear Weapon Free Zone Treaty (Treaty of Rarotonga) (1985)

(6) The African Nuclear Weapons Free Zone Treaty (Treaty of Pelindaba) (1996)

(7) The Treaty of the Southeast Asia Nuclear Weapon Free Zone (Bangkok Treaty) (1995)

(8) *Central Asian Nuclear-Weapon-Free Zone* (Treaty of Semipalatinsk) (2006)

(i) General principles and rules of international humanitarian law of relevance to the protection of the environment in relation to armed conflict

(i) The principle of distinction

(ii) The rule of military necessity

(iii) The principle of proportionality

(iv) The principle of humanity

(j) Other instruments related to the corpus of the law of warfare

(i) The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994)

(ii) The Customary Law Rules by the International Committee of the Red Cross (ICRC) (2005)

(iii) The Manual on International Law Applicable to Air and Missile Warfare by the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) (2009)

Numerous resolutions from UNGA addressing the question of protection of the environment in relation to armed conflict. They are not cited here.

(k) Cases in courts and tribunals in which the issue of the protection of the environment in relation to armed conflict has been addressed

(i) Case law of the International Court of Justice (ICJ)

(1) Legality of the threat or use of nuclear weapons, Advisory opinion 8 July 1996

(2) Legality of the use of force (Serbia and Montenegro v. NATO), Orders of 2 June 1999[24]

(3) Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005.

Decisions of international tribunals such as the decision of the International Criminal Court (ICC) on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir of 4 March 2009, the second Decision of the ICC on the Prosecution's Application for a Warrant of Arrest of 12 July 2010 and decisions by the United Nations Compensation Commission (UNCC).

2. International environmental law

(a) Multilateral environmental agreements (MEAs)

(i) MEAs that directly or indirectly provide for their application in relation to armed conflict:

(1) Universal conventions:

(a) International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) (1954);

(b) Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) (1971);

(c) Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (1972);

(d) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) (1972);

(e) International Convention for the Prevention of Pollution from Ships (MARPOL) (1973), as amended by its Protocol I (1978);

(f) Convention on Long-Range Transboundary Air Pollution (LRTAP) (1979);

(g) United Nations Convention on the Law of the Sea (UNCLOS) (1982);

(h) United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (1997).

(2) Regional conventions include:

(a) Convention for the Protection of the Mediterranean Sea against Pollution (1976), amended and renamed Convention for the

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[24] On 30 June 1999 the Court delivered its orders in the following eight cases between Serbia and Montenegro and members of NATO: *Serbia and Montenegro v. Belgium, Serbia and Montenegro v. Canada, Serbia and Montenegro v. France, Serbia and Montenegro v. Germany, Serbia and Montenegro v. Italy, Serbia and Montenegro v. Netherlands, Serbia and Montenegro v. Portugal* and *Serbia and Montenegro v. United Kingdom.*

Protection of Marine Environment and the Coastal Region of the Mediterranean (1995);

(b) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention) (1983);

(c) African Convention on the Conservation of Nature and Natural Resources (Revised) (2003);

(ii) Multilateral environmental agreements that specifically provide for suspension, derogation or termination in relation to armed conflict:

(1) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993)

(2) Convention on Third Party Liability in the Field of Nuclear Energy (1960)

(3) Vienna Convention on Civil Liability for Nuclear Damage (1963)

(4) International Convention on Civil Liability for Oil Pollution Damage (1971)

(iii) Multilateral environmental agreements that may be of relevance for the protection of the environment in relation to armed conflict:

(1) Convention on Early Notification of a Nuclear Accident (1986)

(2) Convention on Biological Diversity (1992)

(3) Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) (1989)

(4) United Nations Convention to Combat Desertification (1994)

(b) Customary international environmental law as reflected in:

(i) The Trail Smelter Principle

(ii) Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (1972)

(iii) World Charter for Nature, UNGA Resolution 37/7 (1982)

(iv) Declaration on Environment and Development (Rio Declaration) (1992)

(v) Programme of Action for Sustainable Development (Agenda 21) (1992)

(vi) UNGA Resolutions 47/37 Protection of the environment in times of armed conflict (1993) and 49/50 United Nations decade of international law (1995)

(vii) World Summit on Sustainable Development (2002)

(viii) UNEP Governing Council Decision 23/1/IV (2005)

3. Human rights law

(a) Framework conventions

(i) Universal Declaration of Human Rights (1948)

(ii) International Covenant on Civil and Political Rights (1966)

(iii) International Covenant on Economic, Social and Cultural Rights (1966)

(iv) Other instruments of international human rights law:

- (1) The Convention on the Elimination of Discrimination against Women (1979)
- (2) The Convention on the Rights of the Child (1989)
- (3) Indigenous and Tribal Peoples Convention (1989)
- (4) Declaration on the right to development (1986)
- (5) Declaration on the Rights of Indigenous Peoples (2007)
- (6) UNGA Resolution XXIV 2542 Declaration on social progress and development (1969) (especially Articles 9 and 25)
- (7) UNGA Resolution 55/2, The United Nations Millennium Declaration (2000)

(v) Regional conventions:

- (1) The European Convention on Human Rights (1950)
- (2) The American Convention on Human Rights (1969)
- (3) The African Charter on Human and Peoples' Rights (1981)

Appendix II
Academic references cited in UNEP's report with updates[25]

Abascal, Christine Stockins. "Protección del medio ambiente en los conflictos armados". Diss. Pontificia Universidad Católica de Chile, 2009.

Anderson, Terry and Bishop Grewell. "The greening of foreign policy". *PERC Policy Series, PS-20*. Bozeman: Property and Environment Research Center, 2000, 11.

Antoine, Philippe. "Droit international humanitaire et protection de l'environnement en cas de conflit armé. " *Revue Internationale de la Croix Rouge*, 74.798 (1992): 537–558.

Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales. *Problemas internacionales del medio ambiente: VII Jornadas, Barcelona, 2 a 5 de julio de 1984*. Barcelona: Bellatera, 1984.

Austin, Jay. *Conflict-environment: Questions over accountability in Kosovo*. Geneva: UNEP Inter Press Service, 11 November 1999.

Austin, Jay and Carl Bruch, eds. *The environmental consequences of war: Legal, economic, and scientific perspectives*. Cambridge: Cambridge UP, 2000.

Bassiouni, M. Cherif. "International crimes: Jus cogens and obligatio erga omnes". *Law and Contemporary Problems*, 59.4 (1996): 63–74.

Blom, Esther, Wim Bergmans, Irene Dankelman, Pita Verweij, and Margje Voeten en Piet Wit, eds. *Nature in war: biodiversity conservation during conflict*. Leiden: Nederlandse Commissie voor Internationale Natuurbescherming, 2000.

Bodansky, Dan. *Legal regulation of the effects of military activity on the environment*. Dessau-Roßlau: German Federal Environment Agency, 2003.

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[25] Extract with updated additions from UNEP's report, *Protecting the Environment During Armed Conflict – An Inventory and Analysis of International Law* (2009), p. 53.

Boelart-Suominen, Sonja Ann Jozef. "International environmental law and naval war: The effect of marine safety and pollution conventions during international armed conflict." *Newport Paper No. 15*. Newport: Naval War College, 2000.

Bothe, Michael. "The Protection of the Environment in Times of Armed Conflict." *German Yearbook of International Law*, 34 (1991): 54–62.

Bothe, Michael, Antonio Cassese, Frity Kalshoven, Alexandre Kiss, Jean Salmon and K.R. Simmonds. "Protection of the Environment in Times of Armed Conflict". *Report to the Commission of the European Communities*, SJ/110/85 (1985).

Bothe, Michael, Carl Bruch, Jordan Diamond, and David Jensen. "International law protecting the environment during armed conflict: Gaps and opportunities." *International Review of the Red Cross*, 92.879 (2010): 569–592.

Bothe, Michael, Karl Josef Partsch, and Waldemar Solfal. *New rules for victims of armed conflicts: Commentary on the two 1977 Additional Protocols to the Geneva Conventions of 1949*. The Hague: Martinus Nijhoff, 1982.

Bouvier, Antoine. "La protection de l'environnement naturel en période de conflit armé". *Revue Internationale de la Croix Rouge*, 73.792 (1991): 599–611.

Bruch, Carl. *Constitutional environmental law: Giving force to fundamental principles in Africa*. 2nd ed. Washington, D.C.: Environmental Law Institute, 2007.

Bunker, Alice Louise. "Protection of the environment during armed conflict: One gulf, two wars". *Review of European Community and International Environmental Law*, 13.2 (2004): 201–213.

Crawford, Alex and Johannah Bernstein. *MEAs, conservation and conflict – A case study of Virunga National Park, DRC*. Winnipeg: International Institute for Sustainable Development, 2008.

Debonnet, Guy and Kes Hillman-Smith. "Supporting protected areas in a time of political turmoil: The case of World Heritage sites in the Democratic Republic of the Congo". *Parks*, 14.1 (2004): 9–16.

Delbrück, Jost. "War, effect of treaties". *Encyclopaedia of Public International Law*, 4 (1982): 310–311.

Desgagné, Richard. "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures". *Yearbook of International Humanitarian Law*, 3 (2000): 109–129.

Dinstein, Yoram. "Protection of the Environment in International Armed Conflict". *Max Plank Yearbook of United Nations Law*, 5 (2001): 523–549.

Eniang, Edem, Amleset Haile, and Teshale Yihdego. "Impacts of landmines on the environment and biodiversity." *Environmental Policy and Law*, 37.6 (2007): 501–504.

Falk, Richard. "The inadequacy of the existing legal approach to environmental protection in wartime." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. J.E. Austin and C.E. Bruch. Cambridge: Cambridge UP, 2000.

Feliciano, Florentino. "Marine pollution and spoliation of natural resources as war measures: A note on some international law problems in the Gulf War." *Houston Journal of International Law*, 14 (1992): 496–497.

Fenrick, William. "The law applicable to targeting and proportionality after Operation Allied Force: A view from the outside." *Yearbook of International Humanitarian Law*, 3 (2000): 53–80.

Fleck, Dieter. "Current legal and policy issues." *Future legal restraints on arms proliferation*. Ed. Julie Dahlitz. Geneva: United Nations, 1996. 21–46.

Gasser, Hans-Peter. "For better protection of the natural environment in armed conflict: A proposal for action." *American Journal of International Law*, 89 (1995): 637–640.

Green, Leslie. "The environment and the law of conventional warfare." *Canadian Yearbook of International Law*, 29 (1991): 222–226.

Greenwood, Christopher. "State responsibility and civil liability for environmental damages caused by military operations." *International Law Studies 1996: Protection of the environment during armed conflict, Vol. 69*. Eds. Richard Grunawalt, John King and Ronald McClain. Newport: Naval War College, 1996.

Guarnacci, Emilia Schiavo. "Conflictos armados y medio ambiente." Buenos Aires, Universidad de Salvador, 2006. http://usuarios.multimania.es/ambientenews/archivos/artic81.htm.

Guillard, David. *Les armes de guerre et l'environnement naturel: essai d'étude juridique*. Paris: Harmattan, 2006.

Heinegg, Wolff Heintschel von and Michael Donner. "New Developments in the Protection of the Natural Environment in Naval Armed Conflicts." *German Yearbook of International Law*, 37 (1994): 281–302.

Herczegh, Géza. "La protection de l'environnement naturel et le droit humanitaire." *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*. The Hague: Martinus Nijhoff, 1984. 725–733.

Henckaerts, Jean-Marie. "International legal mechanisms for determining liability for environmental damage under international humanitarian law". *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Huang, Ling-Yee. "The 2006 Israeli-Lebanese Conflict: A case study for protection of the environment in times of armed conflict." *Florida Journal of International Law*, 20 (2008): 103–113.

Hourcle, Laurent R. "Environmental law of war." *Vermont Law Review*, 25 (2000): 653–681.

Hulme, Karen. *War torn environment: Interpreting the legal threshold*. Leiden: Martinus Nijhoff, 2004.

Jensen, Eric Talbot. "The international law of environmental warfare: active and passive damage during times of armed conflict." *Vanderbilt Journal of Transnational Law*, 38.1 (2005): 145–186.

Jensen Eric Talbot and James Teixeira, Jr. "Prosecuting members of the U.S. military for wartime environmental crimes". *Georgetown International Environmental Law Review*, 17 (2005): 651–671.

Kellman, Barry. "The chemical weapons convention: A verification and enforcement model for determining legal responsibilities for environmental harm caused by war." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Landel, Morgane. "Are aerial fumigations in the context of war in Colombia a violation of the rules of international humanitarian law?" *Transnational Law and Contemporary Problems*, 19 (2010): 419–513.

Lavieille, Jean-Marc. "Les activités militaires, la protection de l'environnement et le droit international." *Revue juridique de l'environnement*, 4 (1992): 421-452.

Lijnzaad, Liesbeth and Gerard Tanja. "Protection of the environment in times of armed conflict: The Iraq-Kuwait War." *Netherlands International Law Review*, 40.2 (1993): 169–199.

Low, Luan and David Hodgkinson. "Compensation for wartime environmental damage: Challenges to international law after the Gulf War." *Virginia Journal of International Law*, 35.2 (1995): 405–483.

Lubell, Noam. "Challenges in applying human rights law to armed conflict." *International Review of the Red Cross*, 87.860 (2005): 737–754.

Malviya, R.A. "Laws of armed conflict and environmental protection: An analysis of their inter-relationship." *ISIL Yearbook of International Humanitarian and Refugee Law*. Sydney: ISIL, 2001.

Marsh, Jeremy. "Lex lata or lex ferenda? Rule 45 of the ICRC study on customary international humanitarian law." *Military Law Review*, 198 (2008): 116–164.

Mates, Rosario Dominguez. "Desafío para el derecho internacional humanitario: Responsabilidad penal internacional del individuo por danos al medio ambiente durante un conflicto armado." *American University International Law Review*, 20 (2004): 43–63.

Mollard-Bannelier, Karine. *La protection de l'environnement en temps de conflit armé*. Paris: Pedone, 2001.

Momtaz, Djamchid. "Les règles relatives à la protection de l'environnement au cours des conflits armés à l'épreuve du conflit entre l'Irak et le Koweït." *Annuaire français de droit international*, 37 (1991): 203–219.

Navas, Fermín Luís Arraiza and Pedro Vareia Fernandez. "Vieques: Practicas de guerra, derechos humanos y ambiente." *Revista Jurídica Universidad de Puerto Rico*, 70 (2001): 209–233.

Okorodudu-Fubara, Margaret. "Oil in the Persian Gulf War: Legal appraisal of an environmental warfare." *St. Mary's Law Journal*, 123 (1992): 204–206.

Okowa, Phoebe. "Environmental Justice in Situations of Armed Conflict." *Environmental Law and Justice in Context*. Eds. Jonas Ebbesson and Phoebe Okowa. Cambridge: Cambridge UP, 2009.

Okowa, Phoebe. *The Plundering of Natural Resources and the Destruction of the Environment in Times of Armed Conflict*. Hague Joint Conference on Contemporary Issues of International law, 2007.

Parsons, James. "The fight to save the planet: U.S. Armed Forces: 'Greenkeeping' and enforcement of the law pertaining to environmental protection during armed conflict." *Georgetown International Environmental Law Review*, 10 (1998): 441–456.

Peterson, Ines. "The Natural Environment in Times of Armed Conflict: A concern for international war crimes law?" *Leiden Journal of International Law*, 22.2 (2009): 325–343.

Prescott, Michael. "How war affects treaties between belligerents: A case study of the Gulf War." *Emory International Law Review*, 7 (1993): 197–201.

Quénivet, Noëlle and Shilan Shah-Davis, eds. *International Law and Armed Conflict: Challenges in the 21st Century*. The Hague: T.M.C. Asser, 2010.

Quinn, John, Richard Evans, and Michael Boock. "U.S. Navy development of operational–environmental doctrine." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Rich, Andy. "The Environment: Adequacy of Protection in Times of War." *Penn State Environmental Law Review*, 12 (2004): 445–558.

Roberts, Adam. "The law of war and environmental damage." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Robinson, Nicholas. "International law and the destruction of nature in the Gulf war." *Environmental Policy and Law*, 21.5/6 (1991): 216–220.

Roscini, Marco. "Protection of the Natural Environment in Time of Armed Conflict." *International Humanitarian Law: An Anthology*. Eds. Jahid Hossain Bhuiyan, Louise Doswald Beck, and Azizur Rahman Chowdhury, Nagpur: LexisNexis Butterworths, 2009.

Ross, Marc. "Environmental warfare and the Persian Gulf War: Possible remedies to combat intentional destruction of the environment." *Dickinson Journal of Environmental Law and Policy*, 10 (1992): 515–534.

Ruiz, José Juste. "Derecho de los conflictos armados y protección del medio ambiente." *Curso de derechos humanos de Donostia-San Sebastian 103*. Juan Soroeta Liceras, ed. San Sebastian: Universidad País Vasco, 2003.

Sands, Philippe. *Liability for environmental damage and the report of the UNEP Working Group of Experts: An introductory note*. London: FIELD, 1999.

Schmitt, Michael. "Green war: An assessment of the environmental law of international armed conflict." *Yale Journal of International Law*, 22 (1997): 1–109.

Schmitt, Michael. "War and the environment: Fault lines in the prescriptive landscape." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Sharp, Walter. "The effective deterrence of environmental damage during armed conflict: A case analysis of the Persian Gulf War", *Military Law Review*, 137 (1992): 1–67.

Tarasofsky, Richard. "Legal protection of the environment during international armed conflict." *Netherlands Yearbook of International Law*, 24 (1993): 17–79.

Tarasofsky, Richard. "Protecting especially important areas during international armed conflict: A critique of the IUCN Draft Convention on the Prohibition of Hostile Military Activities in Internationally Protected Areas." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Tolentino, Amado. *The law of armed conflict vis-à-vis the environment*. Leiden: Koninklijke Brill, 2010.

Tucker, Matthew. "Mitigating collateral damage to the natural environment in naval warfare: An examination of the Israeli naval blockade of 2006." *Naval Law Review*, 57 (2009): 161–201.

Verwey, Wil. "Observation on the legal protection of the environment in times of international armed conflict". *Hague Yearbook of International Law, Vol. 7*. The Hague: Martinus Nijhoff, 1994.

Verwey, Wil. "Protection of the environment in times of armed conflict: In search of a new legal perspective." *Leiden Journal of International Law*, 8 (1995): 7–40.

Vöneky, Silja. "A new shield for the environment: Peacetime treaties as legal restraints of wartime damage." *Recueil* 9 (2000): 20–22.

Vöneky, Silja. "Peacetime environmental law as a basis of state responsibility for environmental damage caused by war." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Vyver, Johan van der. "Advancing the consensus: 60 years of the Universal Declaration of Human Rights: The environment: State sovereignty, human rights, and armed conflict." *Emory International Law Review*, 23 (2009): 85–112.

Westing, Arthur. *Warfare in a fragile world: Military impact on the human environment*. London: Taylor and Francis, 1980.

Westing, Arthur. "In furtherance of environmental guidelines for armed forces during peace and war." *The environmental consequences of war: Legal, economic, and scientific perspectives*. Eds. Jay Austin and Carl Bruch. Cambridge: Cambridge UP, 2000.

Wyatt, Julian. "Law-making at the intersection of international environmental, humanitarian and criminal law: The issue of damage to the environment in international armed conflict." *International Review of the Red Cross*, 92.879 (2010): 593–646.

Zemmali, Ameur. "La protection de l'environnement en période de conflit armé dans les normes humanitaires et l'action du Comité international de la Croix Rouge." *International legal issues arising under the United Nations Decade of International Law*. The Hague: Martinus Nijhoff, 1995. 105–131.